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No. 86-2030

In the Supreme Court of the United States

OCTOBER TERM, 1986

STANLEY ANDRZJEWSKI, ET AL.

Petitioner.

v.

CONSTANCE HORNER, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the Federal Circuit erred in finding that OPM's emergency furlough regulation at 5 CFR 752.404(d)(2) is compatible with 5 U.S.C. 7513(b), which compels 30 days notice prior to a furlough of less than 30 days.

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v.

CONSTANCE HORNER, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petitioners, Stanley Andrzjewski et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra* (p. 1a - 20a) is reported at 811 F.2d 571 (Fed. Cir. 1987). The opinion of the Merit Systems Protection Board (Board) (Appendix, infra p. 21a-30a) was docketed as MSPB No. PH07528210189.[1]

[1] The Board participated as an amicus on the side of the instant Petitioner Andrzjewski before the Federal Circuit. The furlough actions formulating the subject of this litigation were taken by Petitioner's employer, Department of Labor, Mine Safety and Health Administration (MSHA).

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1987. A petition for rehearing suggestion for rehearing en banc was filed on March 9, 1987. The petition for rehearing was denied by the Court of Appeals on March 20, 1987. The suggestion for rehearing en banc was declined on April 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutory provisions, 5 U.S.C. 7511, 7512, 7513, 7514 and 31 U.S.C. 1341 are set forth in the Appendix, *infra* at 51a-54a. HRJ Res. 370, Pub. L. No. 97-92, the Continuing Resolution that precipitated the furlough action, and 5 CFR 752.404 (d)(2), the so-called emergency furlough regulation at issue herein, are also set forth in the Appendix, *infra at 50a and 55a.* The Federal Circuit's condoned abandonment of notice and opportunity to reply, also calls into play the due process clause of the United States Constitution.

STATEMENT OF THE CASE

On September 23, 1981, the House of Representatives considered HR 4560, the regular appropriation bill to fund the Mine Safety and Health Administration (MSHA) and other agencies for the fiscal year ending September 30, 1982. On October 6, 1981, Representative Rousselot moved to amend the bill by adding the following clause:

> Provided further that none of the funds appropriated under that paragraph shall be obligated or expended to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the Federal Mine Safety and Health Act of 1977 with respect to any person engaged in the surface mining of stone, clay,

> colloidal phosphate, sand, or gravel, or with respect to any person engaged in construction activities on the surface area of any coal or other mine. 127 Cong. Rec. 23384 (1981).

The motion carried and Mr. Rousselot's language became part of the bill as it went to the Senate. The bill, as reported, made an appropriation of $155,734,000 for the expenses of MSHA, and Mr. Rousselot neither proposed nor obtained any reduction in that amount. The bill then went to the Senate, whose Committee on Appropriations on November 9 reported the bill, deleting the amendment and thus restoring authority for the activities Mr. Rousselot sought to eliminate, yet reducing the appropriation to $155,534,000. S. Rep. No. 268, 9th Cong. 1st Sess. (1981).

Congress took no further action on the regular appropriation bill for the year ending September 30, 1982. To avoid total lapse, Congress resorted to the continuing resolution on December 15, 1981, HRJ 370, Public Law 97-92, 95 Stat. 1183. (App. p. 50a). The Continuing Resolution provided appropriations to a number of agencies for the period December 16, 1981, through March 31, 1982 or until an appropriation is enacted, whichever occurs first.

The report of the House Committee on Appropriations stated that the continuing resolution incorporated the Rousselot Amendment, despite the disapproval by the Senate Committee. HR Rep. 372, 9th Cong. 1st Sess. 6 (1981). The statute did not reduce MSHA's overall appropriations.

On December 18, 1981, the Acting Administrator for MSHA issued notices to approximately 200 MSHA employees informing them that they would be furloughed without pay, effective January 3, 1982, for a period not to

exceed February 2, 1982.[2] The notice provided that neither a 30 day advance notice nor an opportunity for reply to the notice was required because the action was taken pursuant to an emergency furlough provision, at 5 CFR 752.404(d)(2).

Appeals from the agency's action were filed in seven Merit Systems Protection Board (MSPB or Board) regions. Presiding officials in five of the regional offices reversed the furlough actions. The Board granted Petitions for Review filed in all of these cases and consolidated all the cases. Relying on another decision issued on that date, *Hastie v. Dept. of Agriculture*, 24 MSPR 64(1984), Appendix p. 31a) the Board found the emergency furlough regulation to be invalid as it violated 5 U.S.C. 7513(b). The Board went on to find that since the furlough actions were taken under the authority of an invalid regulation, they were not in accordance with law, pursuant to 5 U.S.C. 7701(c)(2)(C).

Petitions for enforcement were filed by Appellants in all of the regions, as MSHA did not comply with the Board's order within the timeframe provided for compliance. OPM then filed a Petition for Review to the Federal Circuit and a request for a stay to the Board. The Board denied OPM's request for a stay finding that OPM has not shown that the Board's decision either raises a serious legal question or that it is likely to succeed on the merits of its appeal, nor satisfied the other criteria of a stay request. The Federal Circuit granted the stay request. Subsequently, as provided, the Federal Circuit in a 2-1 decision reversed the decision of the Board which had found the emergency furlough regulation at 5 CFR 752.404(d)(2) invalid. The Federal Circuit then denied Andrzjewski et al.'s Petition for Rehearing Suggestion of Rehearing En Banc.

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[2] However, prior to this on October 21, 1981, in apparent anticipation of this action by Congress, the Acting Deputy Assistant for MSHA sent out a general notice of a reduction in force to all employees. (Andrzjewski's Court of Appeals Supplemental Appendix, p. 48).

REASONS FOR GRANTING THE PETITION

The Court below has decided an important question of federal law which has not been, but should be settled by this Court. In a 2-1 decision the Federal Circuit reversed the decision of the Merit Systems Protection Board (MSPB) which held that an emergency furlough regulation, 5 C.F.R. 752.404(d)(2) was invalid.[3]

The majority, it is respectfully maintained, makes an entirely unprecedented and novel ruling without any apparent countenance to legislative history or case law, that the notice provisions contained in 5 U.S.C. 7513(b) are inapplicable to certain furlough actions of less than 30 days, set forth at 5 U.S.C. 7512(5).[4] The court's ruling may have a significant impact upon how thousands of government employees are treated in times of continuing resolutions, and may impact upon applications and interpretation of the Antideficiency Act. The dissent recognized quite clearly that

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[3] CFR 752.404(d)(2) provides that "the advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities."

[4] 5 U.S.C. 7513(b) provides in full:

"(b) An employee against whom an action is proposed is entitled to—

"(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

"(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

"(3) be represented by an attorney or other representative; and

"(4) a written decision and the specific reasons therefor at the earliest practicable date.

"OPM wants to use this case to obtain a holding citable in the very different situation of a total and government-wide lapse of funding." (Appendix p. 13a). However, the dissent recognizes that this is a "situation entirely unlike the one we must deal with here, one where ample appropriated funds apparently are available at least for discontinuance expenditures including employee's pay claims." (Appendix p. 18a). Nevertheless, OPM and other agencies will undoubtedly and misguidedly attempt to use this regulation and majority holding in a myriad of situations, including the more recurring lapses of appropriations and continuing resolutions. The special and important reasons for review include the due process deprivation incidental to invoking this regulation, as set forth *infra*.

In this case, the Department of Labor, Mine Safety and Health Administration (MSHA) made a determination to furlough approximately 200 employees in response to an amendment by Congressman Rousselot, which was incorporated by reference into a continuing resolution, HRJ Res.370. Pub. L.97-92 (1981). The crux of the majority's ruling at page 14 of the opinion is that:

> if an emergency furlough action is taken because an agency has no choice, rather than for the "efficiency of the service". . . as that term is generally understood — it can reasonably be said that the agency did not "take an action" covered by chapter 75. Thus the notice provision of section 7513(b) would be inapplicable. (Appendix p. 11a)

It is respectfully maintained that this interpretation directly contravenes the clear and express language of the Civil Service Reform Act (CSRA). Chapter 75 of the CSRA is entitled "Adverse Actions". 5 U.S.C. 7511(a)(5) defines furlough as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons." 5 U.S.C. 7512

entitled "Actions Covered" provides "this subchapter applies to— . . . (5) a furlough of 30 days or less." 5 U.S.C. 7513 provides in part that:

> (a) Under regulations prescribed by the Office of Personnel Management, an agency may *take an action covered by this subchapter* against an employee only for such cause as will promote the efficiency of the service. (b) An employee against whom an action is proposed is entitled to — (1) at least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action. . . .[5]

Thus, quite clearly, furloughs of 30 days or less are actions covered under this chapter. Agencies taking actions under this subchapter, by statutory mandate must afford 30 days advance written notice except under the crime provision. The provision permitting taking a furlough only for such cause as will "promote the efficiency of the service" is set forth as a nexus requirement, not as a definitional predicate for all adverse actions. Obviously a nexus might be more easily established in a non-disciplinary context, however, the statute is not intended to simply apply its procedural safeguards to actions based on misconduct or discipline. For under this reasoning or approach, Agency initiated removals for employees who refuse to accept a transfer or a new assignment pursuant to a reorganization or rotation policy, actions conceivably precipitated by Congressional action or management prioritization of resources, due to funding shortages or lack of work unrelated to the conduct of

[5] The majority does not acknowledge that its decision apparently removing coverage of chapter 75 if an agency has "no choice" also permits dispensal with the other procedural safeguards of 5 U.S.C. 7513(b); an opportunity to answer (reply) within a reasonable time, not less than 7 days; to be represented by an attorney or other representative; a specific written decision at the earliest practicable date, and presumably an appeal itself to MSPB.

employees, could as facilely dispense with statutory procedural requirements. Moreover, certain reduction in grade actions due to new classification standards require Chapter 75 procedure, even though the decision is not discretionary. *Gibson v. Dept. of Navy*, 20 MSPR 274 (1984). The nondisciplinary nature of all furloughs are recognized in the statutory definition itself. Yet Congress consciously treated furloughs as all adverse actions requiring certain procedural safeguards. The statute is not ambiguous. All furloughs of 30 days or less are covered under the subchapter, and require the notice and reply provisions of the statute.

The definition of furlough in the statute takes absolutely no account of whether the agency has a "choice" or whether it is for the "efficiency of the service." Nor are the two categories mutually exclusive, or readily distinguishable. The latter problem is evidenced by the majority's inability to, or determination simply not to, so categorize the instant furlough.[6]

The legislative history on this matter clearly evinces Congressional intent to place all furloughs of permanent employees within the coverage and scope of the adverse action protections. S. Rep. No. 95-969 reprinted in 1978 U.S. Code Congressional and Ad. News 2723, 2722. In specifying the actions covered under 7512, it provides:

> This section identifies the *actions covered by this subchapter;* removals, suspensions for more than 30 days, reductions in grade, reductions in pay of an amount exceeding one step of the employee's grade or 3% of the employee's basic pay; *and furloughs of 30 days or less.* Furloughs for more than a total of 30 days shall con-

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[6] At page 3 of its opinion, the majority declared that MSHA "*construed* the incorporated bill to require it to furlough 139 of its employees." (emphasis is added). However, Judge Nichols in his dissent, recognizes that the Agency certainly had a choice, as the furloughing was not the only possible response.

> tinue to be reduction in force actions taken under section 3502 of this title. (emphasis added).

Addressing Section 7513, the Senate Report states:

> Subsection (a) provides that an agency may take an adverse action of the kind described in section 7512 against an employee for such cause as will promote the efficiency of the service. Id.

With respect to the relevant notice period, the legislative history provides that:

> the 30 day period may be reduced only when there is reasonable cause to believe the employee is guilty of a crime for which a sentence of imprisonment can be imposed. Id. at 2772.

See also H. Rep. No. 95-1403, 95th Cong. 2d Sess. 21-2(1978) stating:

> "Subchapter 11 of Ch. 75 relates to removals and suspensions of more than 14 days, reductions in grade or pay and *furloughs of 30 days or less.* These actions are *adverse actions* and in such cases an employee is entitled to *full administrative protections."* (emphasis added).

Therefore, the legislative history reflects a conscious legislative intent to place furloughs under the adverse action section and afford employees affected thereby with full procedural safeguards.

The element of "no choice," indeed the sole criteria of "no choice" utilized by the majority to determine if a furlough is to be covered by Chapter 75 is nowhere enunciated or remotely suggested in the statute, legislative history, or case law. OPM invents this notion of lack of choice, however even it recognized, in its principal brief, that the concept of "no choice" necessarily contemplates that affording the employees their procedural rights would expose the agency

officers to administrative and criminal sanctions pursuant to the Antideficiency Act, 31 U.S.C. 1350.

In this regard, the majority's analysis of the emergency furlough regulation begins with an assertion that there is an apparent tension between 5 U.S.C. 7513, which the court states "unequivocally requires 30 days advance written notice for any adverse action" (Appendix p. 7a), and the Antideficiency Act, 31 U.S.C. 1341 et seq. which prohibits an agency from expending or obligating funds that have not been appropriated. The latter, the majority recognizes, is cited by OPM as the basis for validating its regulation. Despite apparently using the Antideficiency Act as a source of an "apparent tension" the majority curiously declared that it is appropriate to decide only whether the regulation is inconsistent with 5 U.S.C. 7513(b), not the issue whether paying the employees for a period equal to the required notice, would violate the Antideficiency Act, 31 U.S.C. 1341. (Appendix p. 3a).[7]

The Federal Circuit, it is respectfully maintained, can not rely on this so-called tension to defeat the "unequivocal" notice provision of 7513(b) and then simply choose to ignore an effort at resolution of the applicability of the Antideficiency Act.

As Judge Nichols clearly stated in the dissent, HRJ Res. 370, did not cut off any funds, thus the Antideficiency Act does not even come into play. The Rousselot amendment, Judge Nichols finds, did no more than prohibit the use of

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[7] The majority, does seem to suggest that only if the agency's proposition that keeping the employees on payroll violates the Antideficiency Act is a correct one, can a legitimate ground for invoking the emergency furlough regulation be maintained. However, the Antideficiency Act has already been addressed and determined to be inapplicable by the Board, and the dissenting judge, making the remand a superfluous exercise.

funds to perform certain work. He declared that the full sum appropriated in the continuing resolution remained available until expended for the salaries of MSHA employees, thus rendering the entire notion of an alleged fiscal emergency a myth. The House Joint Resolution, he finds consistent with the arguments asserted by Andrzjewski, et al., did not prohibit spending any money, within the overall statutory ceiling for any reasonable and legally authorized purpose. Judge Nichols declares:

> Mr. Rousselot, and the Congressmen who voted for his amendment, could not have intended HR 4560 to have any immediate effect on the legal right of the persons who had administered the program to be paid for any periods. First they did not express any such intent in the amendment, text or elsewhere. Second, the thrust of their effort was to adjudicate an interagency jurisdictional dispute not to curtail expenditure, which curtailment, if achieved at all, was a byproduct. Third, they did not make any move to adjust the $155,734,000 agency figure downward to take advantage of any saving in payroll to result from their curtailment of the program. Fourth, they must have realized that the effect of their amendment, if it became part of a regular appropriation act such as HR 4560[8] was meant to be, would have been to precipitate moves to dismantle the agency in whole or in part, including separation of surplus employees, for which substantial money would have been required [Judge Nichols then references statutes covering severance pay, retirements on full annuity, accrued annual leave]. . . . One who wrongly thought HJ Res. 370 curtailed rights under 5 U.S.C. 7513(b) would very likely have wrongly thought HR 4560 would have curtailed rights under the other statutes mentioned, for example, as to severance pay. I do

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[8] Congress took no action on HR 4560, the regular appropriation bill to fund MSHA and other agencies, thus necessitating the continuing resolution, HRJ Res. 370.

> not think any Congressman of the real world would have intended to attack vested rights in such a manner, and all to no purpose, since the rights in question could have been enforced even in the absence of appropriation, in the then Court of Claims, and paid out of the open-ended appropriation for paying Court of Claims judgments. *Ellis v. U.S.*, 657 F.2d 1178 (Ct. Cl. 1981). (Dissent p. 5, 6).

Judge Nichols cited consistent precedent for the proposition that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by implication the substantive law, does not in and of itself, defeat a government obligation created by statute. *N. Y. Airways v. U.S.*, 369 F.2d 743 (Ct. Cl. 1966). Pay entitlement is for the amount provided for by law, not for the amount appropriated, *French v. U.S.*, 16 Ct. Cl. 419 (1980). (Appendix p. 23a). The furlough action, Judge Nichols properly recognized, is a reasonable selection among possible alternatives. However, he concluded "nothing is added to require disregard of employee's entitlements, among which the 30 day notice of section 7513(b) clearly belongs, with pay while the notice is running." (Appendix p. 17a). "[A]mple appropriated funds apparently are available at least for discontinuance expenditures, including employee's pay claims." (Appendix p. 18a). Judge Nichols stated further:

> I think if a funding crisis produced by an Act of Congress is within the regulation at all, it must be one to be taken as a *pro tanto* repeal of section 7513(b) because it makes such an intention clear or makes that section legally or practically impossible to comply with. There is nothing to show this is such a case: the financial means of complying with section 7513(b) were apparently provided. (Appendix p. 19a).

Judge Nichols flatly rejected OPM's Antideficiency Act argument.

> The Antideficiency Act, 31 U.S.C., Sec. 1341, as now codified, formerly section 665a, prohibits agency officials from making expenditures or incurring obligations in excess of the amounts appropriated for it, or creating contracts or obligations in anticipation of future appropriations. Officials who violate these constraints are threatened with jail terms or fines by section 1350. The agency argued it would incur section 1350 penalties if it paid furloughed employees for the 30-day notice period, but this argument is based on an interpretation of the Rousselot Amendment that I reject. Funds to continue payment during the 30-day notice period were appropriated and available under HRJ Res. 370, so long as disapproved work was not done, as it appears to me. (Appendix p. 19a).

While the dissent correctly states that the Board does not resolve the Antideficiency Act issue in its decision below, the Board quite clearly declared in its February 26, 1985 opinion denying OPM's request for a stay:

> [W]hile we recognize that the Anti-deficiency Act prohibits the expenditure or obligation of funds in the absence of appropriations (footnote omitted), the order in this case would not require such an action. The funding restriction did not reduce MSHA's appropriation; it only prohibited expenditures on certain functions. As long as MSHA does not spend money on the prohibited functions, the Anti-deficiency Act will not be violated, Cf. 60 Comp. Gen. 440. Since the Board's order would not require MSHA to spend money on the prohibited functions, compliance will not violate the Act. Indeed MSHA apparently recognized this itself when it continued to employ appellants in some capacity for two weeks (actually 19 days) after the enactment of the funding restriction. (Appendix p. 56a, 59a).

Indeed, the Continuing Resolution had no imminent deadline and provided appropriations to the agency for the

period December 16, 1981 through March 31, 1982, or until an appropriation is enacted.

Moreover, numerous presiding officials of the MSPB also rejected this agency argument recognizing that the continued retention of Appellant employees for the period of time necessary to afford them the statutory 30 day notice period would not have required the Department of Labor to authorize an expenditure from or create or authorize an expenditure in excess of the amount available under their appropriations. The presiding official in MSPB's Dallas region found the agency had the financial wherewithal to pay employees to accomplish legitimate tasks for the period of time necessary to provide them with the advance notice period required by 5 U.S.C. 7513(b). [Supplemental Appendix to Court of Appeals (hereinafter Supp. App.)(p. 42, 43)]. Accord: Philadelphia region (Supp. App. p. 55, 56). As the Appellant employees maintained, and the MSPB recognized, the folly of OPM's argument is exposed by the fact that if the Antideficiency Act was relevant herein, the Department of Labor's continued employment of Appellants for some 19 days after the Continuing Resolution, meant that Labor officials had already engaged in criminal actions.

The majority's subsequent analysis of the significance of the existence of a similar emergency furlough regulation prior to the inception of the CSRA overlooks a number of important facts and issues. The court overlooks the fact, that the true ancestor of the present emergency furlough regulation, was however, first promulgated in 1938, and at that time it was valid as furloughs were not defined as adverse actions, and notice and opportunity to reply were not required. The CSRA for the first time applied the furlough provisions to all non-probationary competitive service employees (not simply veterans under the Veterans Reference Act). Moreover, the court ignores the legislative history of the Veterans Preference Act as set out by the Board in its

companion decision in *Hastie v. Dept. of Agriculture*, 24 M.S.P.R. 64 (1984). It demonstrates Congressional intent to limit the power of the executive branch to regulate in the area if it resulted in derogation of protections afforded to preference eligibles in federal government. This analysis of purpose and policy, coupled with clear language of the statute, legislative history, and recognized principles of statutory construction, resulted in the MSPB declaration that the precursor 1944 regulation under the Veterans Reference Act was of questionable validity. (Appendix p. 31a-49a). After analyzing the genesis of the furlough provision, MSPB found that the notice provision was mandated by the CSRA.

The majority in rejecting the MSPB's statutory construction as being irrelevant or begging the question, never indicates why it neither affords the MSPB's decision the deference it is entitled to, nor accepts the recognized principles of statutory construction. Absent a clearly expressed legislative intention to the contrary, the language of the statute ordinarily must be considered conslusive. *CPSC v. GTE Sylvania, Inc.* 447 U.S. 102 (1980); *Amoco Oil Co. v. U.S.*, 749 F2d 1576 (Fed. Cir. 1984). The majority presumes that Congress was specifically aware of this emergency furlough regulation when enacting the CSRA, when there is absolutely no indication of this; notwithstanding the myriad of OPM civil service regulations and policy statements. The majority repudiates as irrelevant, without further discussion, the following three tenets of statutory construction set forth by the Board in *Hastie v. Dept. of Agriculture*, 24 MSPR 64 (1984): The expression of one exception in the statutes indicates that no other exceptions apply. See 2-A C. Sands, Sutherland Statutory Construction, Sec. 47.11, 47.23, (4th ed. 1973); inaction by Congress is a far cry from approval, K. Davis, Administrative Law Treatise, Sec. 5.07 at 334 (1958); reenactment of a statute cannot save a regulation which contradicts the requirements of the statute itself.

Commissioner of Internal Revenue v. Acker, 361 U.S. 87 (1959). The majority ignores the MSPB's citation in *Hastie*, following its statement in the Administrative Law Treatise, to *F.W. Woolworth Co. v. U.S.*, 91 F.2d 973, 976 (1931) where Justice Hand declared, "to suppose Congress must particularly correct each mistaken (regulatory) construction under penalty of incorporating it into the fabric of the statute, appears unwarranted." (Supp. App. p. 22). It is improper to merely presume that OPM's interpretation has Congressional approval. The court also departs from the recognized statutory construction that there must be a concrete showing that a consistent administrative interpretation has been brought to the attention of Congress. *Columbia Broadcasting System v. FCC*, 453 U.S. 367, 383 (1981); *Allen v. Grand Central Aircraft*, 347 U.S. 535 (1954). There has been absolutely no showing that OPM's emergency furlough regulation was brought to Congress' attention or Congress was otherwise aware of it. As Judge Nichols plainly states: "[i]t is wrong . . . to impute to Congress an intent to repudiate entitlements it has itself created unless the intent plainly appears." (Appendix p. 15a).

The majority, thus declares that in order to resolve the question of the validity of the regulation it must turn to the policy underlying the statute. (Appendix p. 8a). However, the majority respectfully never resolves that policy, declaring that it sould be inappropriate to choose either statutory purpose posited by OPM or the MSPB, as "both are based on conjecture, nothing more." (Appendix p. 10a). The majority sets forth OPM's recitation of the statutory purpose, that the notice and opportunity to reply serve a purpose only when the agency has discretion "to take the proposed action", and "conversely, where the proposed action is necessitated by unforeseeable circumstances, the rights to notice and opportunity to reply serve no purpose." (Appendix p. 8a). The majority erroneously equates lack of discretion with unforeseeable circumstances as provided in

the regulation. Moreover, the Agency was not compelled to take the furlough actions, and had the ability to take other actions. Secondly, as set forth *infra*, there are numerous other instances of reassignments, transfers and reclassifications, resulting in reductions in grade or removals for which an Agency can argue little or no discretion, which do not and can not take the action outside of Chapter 75.[9] In addition, the possibility of unforeseeable circumstances, even under OPM's analysis, still improperly precludes an employee's

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[9] Indeed, the Agency action was not compelled by an unforeseeable circumstance. Rousselot's move to amend HR 4560, the regular appropriation bill to fund MSHA, carried the House on October 6, 1981 and became part of the bill as it went to the Senate. It contained the identical prohibition of expenditures contained in the joint resolution passed on December 15, 1981. The presiding official of the Dallas Region of the MSPB in *Pedroza v. Dept. of Labor*, stated that "the Agency knew or ought to have known at least as early as October 7, 1981, that Congress was considering action that would remove mining operations from its jurisdiction. "Indeed the record in many of the MSPB regions reflects that a general notice of reduction in force was sent to all MSHA employees on October 21, 1981 (Supp. App. p. 48) informing them that it would have to complete an extensive RIF on or about December 31, 1981. Certainly budget constraints and resulting personnel decisions were contemplated. The Department of Labor conceded in its Consolidated Petition for Review to the MSPB that they had been put on notice that Congress was considering such action. If management could issue general RIF notices on October 21, 1981, they certainly had the foresight to provide notices of a furlough if they felt this was their only available option. As Judge Nichols clearly recognized "what was unforeseeable about it? Storm clouds were visible from MSHA headquarters at least as early as House passage on October 6 of Mr. Rousselot's amendment. Several presiding officials properly pointed this out." (Appendix p. 18a). Again, this analysis is only necessary if as OPM maintains, the Antideficiency Act, compelled immediate release of these employees.

meaningful reply, i.e. that the proposed furlough should not have been taken; other positions or work are available; reduction in force action should have been utilized. The Court recognizes merely one purpose enunciated by the Board of a 30 day notice provision - "a mechanism to all allocate the risks of adverse financial consequences between the employee and the agency." The majority again cites in rebuttal the OPM argument that such a purpose would conflict with the Antideficiency Act, but also again declines to resolve this argument. (Appendix p. 10a). Moreover, this unitary purpose announced by the majority overlooks other purposes presented by the Board and Appellants for the notice provision, and any and all purposes for a reply. The 30 day notice provision itself serves no different purpose for a removal for cause than in a situation where an agency asserts little discretion in taking the action. As the MSPB in *Hastie* declared, wholly ignored by the majority, the provision of notice also serves as a protection against unfair surprise and as a safeguard against arbitrary action. The court ignored further MSPB's acknowledgment of an employee's assertion that the lack of notice did not provide enough time to permit locating temporary employment. The opportunity for reply would have provided Respondents with an opportunity to persuade the Agency to detail them to other positions rather than furlough them, as the continuing resolution did not eliminate any funding from the agency's budget, but merely prohibited the agency from spending money on particular functions. In the Denver Region of the MSPB, a Department of Labor District manager acknowledged that during this furlough period other work could have been found for these furloughed employees. (Supp. App. p. 49). The presiding official in the Dallas region found that the record demonstrated that the agency possessed a backlog of work to be accomplished. Moreover, as the agency had not suffered any reduction in appropriations, it had the financial wherewithal to pay employees to accomplish legitimate tasks for the

period of time necessary to provide them with the advance notice period required by 5 U.S.C. 7513(b) (Supp. App. p. 41). The factual reality, continually overlooked by the majority, is that for a period from between December 15, 1981, the passage of the continuing resolution at issue, Public Law 97-92, until January 4, 1982, the first day of the furlough, these MSHA employees continued in their employment with MSHA, engaging in apparent underground coal mining operations, administrative tasks, or winding down operations.[10] The effect of the majority's opinion is to completely foreclose an employee from making a reply which would have possibly affected the Agency's decision. In the Atlanta region of the MSPB, MSHA employees asserted that the failure to issue advance written notices, affected their ability to challenge the selection process for determining which employees should actually be furloughed, in violation of 5 C.F.R. 752.404(b)(2). In the St. Louis Region, the MSPB presiding official found that if the 30 day notice provision, opportunity to review material upon which the action was based, a precursor to an effective reply, and the reply itself, were adhered to, the affected MSHA employees would have had an opportunity to show that viable alternatives were available other than a furlough, and again challenge the selection process. (Supp. App. p. 75, 76). During the course of the MSPB hearings, furloughed employees came forth with evidence showing where they were qualified to work and where work was available. In other instances, outside work was precluded, and annual leave was forbidden to be used. Notice and opportunity to reply would have given the employees an opportunity to advance arguments why they should be permitted to remain on the payroll, a result not in

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[10] Again, the MSPB in its February 26, 1985 order denying a stay (Appendix p. 59a) recognized that this continuation in employment for over two weeks after the enactment of the funding restriction demonstrates the fallacy of OPM's Antideficiency Act arguments.

the least prohibited by the continuing resolution. Indeed the majority's analysis removing furloughs from Ch. 75 coverage appears to dismantle not only the entire procedural framework to safeguard employee rights, but also access to any administrative body or grievance procedure to challenge an agency's arbitrary or unjustified action.

The majority ignored all of this, and rejected the partial purpose it attributes to the Board and OPM's purported purpose as conjecture. In so doing the majority repudiated the clear language of the statute. It is only permissible for a court to deviate from the literal meaning of a statute when acceptance of the literal meaning would thwart the obvious purpose or policy of the statute. *Perry v. Commerce Loan Co.* 383 U.S. 392, 400 (1986). *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). In light of the fact that nothing in the legislative history shows Congressional intent to depart from the literal and clear words used in the statute, there is no justification for rebuffing its language. *Ozawa v. U.S.* 260 U.S. 178, 194 (1922). Absent specific findings of contrary legislative history, the majority never really explains why it deviates from the dictates of *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-195 (1980), i.e. that it is inappropriate for a judicial body to sit as a committee for review and to disregard the order of priorities that Congress consciously selected as reflected in the clear language of the statute at 5 U.S.C. 7513.

It is in this context that the majority goes about redefining the concept of furloughs. The majority, although addressing the Board's decision in *Cuellar v. U.S. Postal Service*, 8 MSPR 282 (1981), at footnote 5 of the opinion, never reconciles or explains its statement that its holding is compatible with that decision. In that case, MSPB had invalidated an OPM regulation at 5 CFR 752.404(d)(3) which permitted dispensal of the 30 day notice period for a removal or indefinte suspension when retention of the employee may be

injurious to the employee, fellow workers or the general public; may result in damage to government property; or reflect unfavorably on the public perception of the Federal Service. As here, the MSPB found the regulation also had a precursor in the Veterans Preference Act, when in 1945, OPM's predecessor Civil Service Commission promulgated a regulation virtually identical to OPM's current regulation. The MSPB in Cueller had conducted its analysis almost identically to that in *Hastie*, finding that Congress maintained the crime exception, contained in 5 U.S.C. 7513(b)(1) as the only justification for avoiding the 30 day notice provision. The majority, herein, passes off the difference in the two cases by simply stating that *Cuellar* dealt with an improper suspension of an employee during the notice period prior to his removal. This distinction, without distinction, is indeed perplexing. The dispensal of the 30 day notice period during a furlough may also be considered a suspension. Moreover, the court does not explain why the MSPB's rejection of OPM's long standing regulation survives judicial scrutiny in *Cuellar*, but cannot withstand judicial scrutiny in the instant case, notwithstanding the alleged absence of clear legislative purpose. Similarly, in *Cuellar*, the MSPB held that it is not free to disregard or reformulate statutory entitlements which Congress has clearly provided to employees subject to significant suspensions and removals.

The majority never takes account or even addresses the narrow standard of review or deference traditionally accorded MSPB decisions. The court's conclusion at page 15 that "there is room for the regulation" does not satisfy the stringent review standards of 5 U.S.C. 7703(c), which require affirmation unless the MSPB decision is found to be:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law or (3) unsupported by substantial evidence.

See *Hayes v. Dept. of Navy*, 727 F.2d 1535 (Fed. Cir. 1984); The MSPB has been given broad authority to administer the civil service system. Deference is presumptively afforded to an agency like MSPB given primary and substantial responsibility for administering and enforcing a statute such as CSRA and which has extensive adjudicative powers. *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981); *Udall v. Tallman*, 380 U.S. 1. 16 (1965). While OPM has the authority to issue regulations, such authority is confined to carrying out the purpose of the subchapter. However, MSPB is entrusted with the ultimate responsibility to review OPM rules, and invalidate a rule which violates any prohibited personnel practices in 5 U.S.C. 2302(b). 5 U.S.C. 1203(a)(4); 1205(e). Section 2302(b)(1) of Title 5 makes it a prohibited personnel practice to take any personnel action if such action violates any law, rule or regulation concerning the merit system principles in Section 2301. In *Hastie*, the MSPB recognized at footnote 25 (Appendix p. 45a) that the merit principle found at 5 U.S.C. 2301(b)(8) states that employees should be protected against arbitraty action and that MSHA employee arguments amount to a contention that the agency acted arbitrarily. Yet the majority never explains why it affords OPM's regulation the deference it does, when it is MSPB which is entrusted with the final reviewing authority, and whose decision is entitled to the proper deference.

At footnote 4 of the opinion, the majority engages in efforts to rearrange the priorities of the statute despite the direction of the Supreme Court in *TVA v. Hill, supra*. The court finds it anomalous to afford notice to furloughs of 30 days or less when Congress afforded no such notice requirement to suspensions of 14 days or less. The court, by presumed inadvertence, cites to 5 U.S.C. 7512 rather than 5 U.S.C. 7503. That section does provide for advance written notice, however not 30 days. To justify the difference between the two actions the majority declares that the sus-

pension is for disciplinary reasons, a furlough for nondisciplinary reasons. To correct what the court perceives as an anomalous result, the court seeks to defeat the clear 30 day notice requirement for furloughs of 30 days or less consciously and clearly provided by Congress. All furlough actions are by definition non-disciplinary, yet the majority rewrites the statute to prevent what it considers an anomalous result. We have previously pointed out the fallacy of this discipline/non-discipline dichotomy in the context of other removals or reductions in grade for failure to accept reassignments, transfers, reclassifications, etc. Moreover, in the same footnote the majority sees an anomaly between the absence of notice permissible under OPM's RIF regulations for a furlough of more than 30 days and the requirement of 30 days notice for a furlough of 30 days or less. Again the majority seeks to override conscious Congressional priorities and engage in its own reasoning, and justification totally contrary to the legislative history. As the MSPB clearly pointed out at footnote 11 of its decision in *Andrzjewski*, there is no statutory requirement for advance notice for furloughs of more than 30 days, treated as RIF actions. OPM regulations do provide in cases of emergency, for placing employees on annual leave, leave without pay, or in a non-pay status for all or part of the notice period. Since there is no statutorily mandated notice period in RIF actions, OPM may provide exceptions to its own regulatorily created notice requirement. Moreover, as pointed out at footnote 16 and 23 of the *Hastie* opinion (Appendix p. 40a, 44a), "since this regulation relates to the employee's pay status during the notice period and does not authorize the agency to eliminate or shorten the 30 day notice period, the regulation is not really comparable to the emergency furlough regulation." As the MSPB stated at footnote 11 in *Andrzjewski*, since the furlough did in fact last more than 30 days, if the agency could have established the existence of an emergency situation during the notice period, it could have employed RIF

procedures, given each appellant 30 days advance notice and placed them in a non-pay status for ll or part of the notice period. The Department of Labor instead chose to utilize adverse action procedures, and failed to accord appellants any of the procedural requirements of Chapter 75.[11]

The majority's drawing of a "comparable analysis" in *Griessenauer v. Department of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985) and *Covington v. Department of Health and Human Services*, 750 F.2d 937, 941 (Fed. Cir. 1984) to reach its conclusion that if an agency has no choice but to take a furlough action, it is not covered by Chapter 75, escapes immediate comprehension. However, if the court is referring to an OPM regulation in *Covington* which provides that voluntary action initiated by an employee precludes a subsequent appeal to the MSPB, it is maintained that considerations for this regulation are wholly inapposite, as the regulation takes nothing away from accepted meanings of covered appealable actions. Moreover, the court readily determined in each case the voluntariness of the resignation. That a purely and untainted voluntary resignation is not appealable to the MSPB is clearly cognizable in the CSRA, its predecessor statutes, the legislative history, and the prevailing case law.

The very statutory definition of furlough as resulting from a lack of work or funds, etc., would trigger under the majori-

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[11] Under the CSRA, an agency must constantly make a decision to utilize viable but alternative statutes in taking actions against federal employees. This decision often results in application of different burdens of proof, procedural processes, and employee rights, and the agency must always bear the consequences of that selection i.e. removals or reductions in grade for unacceptable performance under Ch. 75 or Ch. 43; removal for national security under Section 7512 or 7532, etc. The Department of Labor consciously selected a furlough of 30 days or less, and must employ the procedures therewith.

ty's approach a perpetual assertion by agencies that lack of work or funds dictated a result that it had no choice but to furlough employees. Thus the result of the majority's decision is the removal of the furlough section from the adverse action protections, a judicial lawmaking not contemplated by the Congress or condonable by the Supreme Court.

Most significantly, the furlough action itself defeated MSHA employees' legislative expection of job retention. Apart from the statutory mandate, the due process clause requires an agency to give notice and an opportunity to respond before it makes a decision to furlough an employee for 30 days or less. *Arnett v. Kennedy*, 416 U.S. 143 (1974); *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985). The right to due process is absolute in the sense that it does not depend upon the merits of a claimant's substantive assertions, *Carey v. Piphus*, 435 U.S. 247, 266 (1978). As the Honorable Judge Nichols stated at page 8 of the dissent:

> The furlough emerges as a reasonable selection among possible actions. Nothing is added, however, to require disregard of employee's entitlements, among which the 30 day notice of section 7513(b) clearly belongs with pay while the notice is running.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

CONSTANCE HORNER, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

STANLEY ANDRZJEWSKI, ET AL.,

Respondents.

Appeal No. 86-644.

DECIDED: January 29, 1987

Before BALDWIN,* and NICHOLS, *Senior Circuit Judges,* and NIES, *Circuit Judge.*

NIES, *Circuit Judge.*

Petitioner appeals from a decision of the Merit Systems Protection Board holding the emergency exceptions 5 C.F.R. § 752.404(d)(2),[1] to the statutory requirement of thirty days advance written notice and opportunity for reply

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* The Honorable Phillip B. Baldwin assumed status as Senior Circuit Judge on November 25, 1986, after having participated as an active Circuit Judge in the consideration and decision of this appeal.

[1] The regulation, 5 C.F.R. § 752.404(d)(2), reads:

> The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

to any adverse action, 5 U.S.C. § 7513(b) (1982),[2] is invalid. We reverse that decision and remand for a determination of whether the regulation was properly invoked.

The issue of the validity of the subject regulation arises in this case from events in 1981, when the federal government came perilously close to running out of appropriated funds for its operations. In order to avoid sending home all the government's employees, as has been necessary on a number of occasions, for example, on October 17, 1986, October 4, 1984, and November 23, 1981, Congress resorted to a continuing resolution, H.R.J. Res. 370, Pub. L. No. 97-92, 95 Stat. 1183 (1981). The resolution incorporated by reference parts of a bill, H.R. 4560, 97th Cong., 1st Sess. (1981), which, by itself,was never enacted into law.

The Mine Safety and Health Administration (MSHA) construed the incorporated bill to require it to furlough 139 of its employees, almost at once, without pay and without the 30 days' advance written notice and opportunity to reply required by 5 U.S.C. § 7513(b). The furloughed employees appealed to the Merit Systems Protection Board, which invalidated the emergency exception regulation relied on by MSHA and canceled the furloughs. *Andrzjewski* v. *Department of Labor*, 24 M.S.P.R. 78 (1984). Both MSHA and the Office of Personnel Management (OPM) petitioned this court for review.

OPM has no right to appeal from a decision by the Merit

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[2] In pertinent part, section 7513(b) reads as follows:

> (b) An employee against whom an action is proposed is entitled to—
>
> (1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer . . . .

Systems Protection Board except upon a petition for judicial review pursuant to 5 U.S.C. § 7703(d). The statute requires that the Director of OPM determine "that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." The Director of OPM made that determination in this case, and after considering the merits of OPM's petition, and a number of opposing briefs, this court accepted the appeal. As part of that order, the effect of the board's decision holding the regulation invalid was stayed during the pendency of this appeal.

In an order dated september 5, 1985, granting the petition, this court indicated that the following questions were raised by the appeal:

> (1) The Merit Systems Protection Board erred in finding that OPM's emergency furlough regulation, 5 C.F.R. § 752.404(d)(2), which provides for immediate furlough under certain emergency conditions, is inconsistent with 5 U.S.C. § 7513(b), which requires 30 days' notice prior to any furlough;
>
> (2) The board erred in automatically reversing the agency action on the basis of harmful error; and,
>
> (3) The board erred in failing to address the question of whether its decision which reversed the furlough actions in question and ordered that the agency pay the furloughed employees' salaries for a period equal to the required notice, would violate the Antideficiency Act, 31 U.S.C. § 1341.

We find it appropriate to decide the first issue only. For reasons that follow, we decided that the board did err in striking down the regulation, and we, therefore, reverse the board's decision and remand.

I

On September 23, 1981, the House of Representatives took up H.R. 4560, the regular appropriation bill to fund MSHA and other agencies for the fiscal year ending Sep-

tember 30, 1982. MSHA and the other agencies were then functioning under a continuing resolution prior to the one here to be construed. On October 6, 1981, Representative Rousselot moved to amend the bill by adding the following clause:

> *Provided further* that none of the funds appropriated under that paragraph shall be obligated or expended to prescribe, issue, administer, or enforce any standard, rule, regulation, or order under the Federal Mine Safety and Health Act of 1977 with respect to any person engaged in the surface mining of stone, clay, collodial phosphate, sand, or gravel, or with respect to any person engaged in construction activities on the surface area of any coal or other mine.

127 Cong. Rec. 23384 (1981). The motion carried, and Mr. Rousselot's language became part of the bill as it went to the Senate. The Rousselot amendment terminated MSHA's jurisdiction over eighty-five percent of the mines it had until then inspected, and reduced its personnel requirements by fifty-five percent. The purpose of the Rousselot amendment was to resolve a dispute over whether MSHA or the Occupational Safety and Health Administration should inspect certain surface mines. *Id.* It was thought the dangers in surface mines were not great enough to warrant the frequent and rigid inspections required for underground mines.

The bill, as reported, made an appropriation of $155,734,000 for the expenses of MSHA, and Mr. Rousselot neither proposed nor obtained any reduction in that amount despite the drastic curtailment of activities resulting from his amendment.

The bill then went to the Senate whose Committee on Appropriations, on November 9, reported the bill, deleting the amendment and thus restoring authority for the activities Mr. Rousselot sought to eliminate, yet reducing the appropriation to $155,534,000. S. Rep. No. 268, 97th Cong., 1st Sess. (1981). The report shows the Senate committee supportive of continued full MSHA activity. *Id.* at 23.

Congress took no further action on the regular appropriation bill for the year ending September 30, 1982, and to avoid total lapse, Congress resorted to the continuing resolution. Prior continuing resolutions having expired, effective December 15, 1981, Congress adopted and the President approved H.R.J. Res. 370. 127 Cong. Rec. 30868 (1981); 17 Weekly Comp. Pres. Doc. 1374-75 (Dec. 15, 1981).

The report of the House Committee on Appropriations stated that the continuing resolution incorporated the Rousselot amendment, despite the disapproval by the Senate Committee. H.R. Rep. No. 372, 97th Cong., 1st Sess. 6 (1981). The report did not indicate whether the level of MSHA's funding was affected or what the level for the remainder of the fiscal year would be. The report did state that Congress would continue efforts to get regular bills signed into law, and in the event of success, the continuing resolution would "disengage and the individual bill then becomes the funding device." *Id.* at 2. Thus, it was unclear whether the restraints of the Rousselot amendment would be lifted and the authority to make the disputed inspections restored.

> H.R.J. Res. 370 provides in section 101:
>
> (3) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection [this includes H.R. 4560] as passed the House as of December 15, 1981, is different from that which would be available or granted under such Act as passed by the Senate as of December 15, 1981, the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority . . . .

Other provisions make a report by an appropriations committee, as occurred in the Senate, the same as action by the entire body.[3]

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[3] The parties assume that the Rousselot amendment, as passed by the House, is a binding part of H.R.J. Res. 370. We need not and do not decide this issue.

On December 18, 1981, the Acting Administrator of MSHA promptly issued notices to selected emloyees establishing furloughs without pay, commencing January 3, 1982, and continuing not to exceed 30 days. The notice stated that neither a 30 days' advance notice nor an opportunity for reply to the notice was required because the action was taken pursuant to the emergency furlough provision of 5 C.F.R. § 752.404(d)(2). The agency claimed "unforeseeable circumstances" as an excuse for the procedural lapse. The agency read into the Rousselot amendment a reduction in the appropriation for its expenses to the extent that it would have been expended for wages and salaries of persons who had been engaged in performing the newly prohibited activities. Under the agency's interpretation, employees transferred to nonprohibited activities could be paid, and were, but those not transferred (the respondents herein) could not be paid, even though in fact they too refrained from all prohibited activities.

The furloughed employees appealed, and the MSPB's presiding officials in several of its regional offices reached varying conclusions. The decisions disagreed over the alleged procedural error in dispensing with the 30 days' advance written notice and opportunity to reply. Some presiding officials held the emergency exception regulation contrary to statute, 5 U.S.C. § 7513(b), and thus invalid. Others upheld the emergency exception regulation and its invocation here. Still others held that any error in not giving 30 days' notice was harmless because the notice and opportunity to respond would have been futile in view of the overwhelming nature of the fiscal catastrophe.

The full board granted the petitions for review, consolidated all the cases, and held that the emergency exception regulation was invalid, relying on another decision of the same date which was not part of the consolidation, *Hastie* v. *Department of Agriculture*, 24 M.S.P.R. 64 (1984). Thus, all employees prevailed.

II

Issue

Whether the emergency furlough regulation, 5 C.F.R. § 752.404(d)(2), is valid or invalid.

III

The board's holding of invalidity of the emergency furlough regulation results from its reading of 5 U.S.C. § 7512 (1982), that a furlough of thirty days *or less* is an adverse action, in conjunction with 5 U.S.C. § 7513(b), which unequivocally requires 30 days' advance written notice for any adverse action. On the other hand, OPM urges that the regulation is lawful, *inter alia*, because of the Antideficiency Act, 31 U.S.C. § 1341 (1982), which prolhibits an agency from expending or obligating funds that have not been appropriated.

That there is a tension between these two statutory provisions is readily apparent. Nothing in the legislative history of the Civil Service Reform Act (CSRA) gives specific guidance on resolution of this conflict. Congress did not, for example, say it intended to overrule the long-standing emergency furlough regulation, 5 C.F.R. § 22.2(c) (1944), which had existed since 1944 in the face of a similar notice provision in the Veterans Preference Act. Ch. 287, § 14, 58 Stat. 387, 390 (1944). Nor can we presume Congress was unaware of the continued existence of the regulation in view of the recurrent end of the fiscal year "emergencies." Nor has Congress, as far as can be determined, even considered overruling the emergency furlough regulation despite enacting other amendments to CSRA.

As a general rule, a long-standing interpretation of a statute by an agency charged with its administration must be upheld if reasonable. *See Young* v. *Community Nutrition Institute*, 106 S. Ct. 2360, 2364-65 (1986). Yet in *Hastie*, the board gave litle weight to OPM's long-standing regulation and the failure of Congress to expressly disapprove or other-

wise proscribe the emergency exception regulation. The board gave three reasons for doing so:

> First, we note that Congress enacted only one exception to the notice and reply requirements for adverse actions [the crime exception], and, as a general rule of statutory construction, the expression of one exception indicates that no other exceptions apply. *See* 2A C. Sands, Sutherland Statutory Construction §§ 47.11, 47.23 (4th ed. 1973). Second, while the failure of Congress to disapprove of the regulation should be considered, it has generally been recognized that such inaction is a far cry from approval. 1 K. Davis, Administrative Law Treatise § 5.07 at 334-5 (1958). More importantly, it is also generally recognized that although Congressional reenactment of a statute can strengthen a regulation's claim to validity, reenactment cannot save a regulation which contradicts the requirements of the statute itself, as is the case here. *Commissioner of Internal Revenue v. Ackers*, 361 U.S. 87, 93, 80 S.Ct. 144, 148, 4 L.Ed.2d 127 (1959).

24 M.S.P.R. at 73-74 (footnote omitted). Each of the board's reasons either is irrelevant to, or begs, the question of whether the statutory language leaves room for OPM's long-standing regulation. In order to resolve that question, we must turn to the policy underlying the statute.

The government argues that the sole purpose behind section 7513(b) is to afford federal employees the opportunity to attempt to persuade the agency that the proposed action should not be taken. From this premise, it follows that the notice and opportunity to reply serve their purpose only when the agency has discretion to take the proposed action. Conversely, where the proposed action is necessitated by unforeseeable circumstances, the rights to notice and opportunity to reply serve no purpose.

Per the government, the board's interpretation converts the rights afforded by section 7513(b) from procedural rights to an entitlement to 30 days' pay. The agency is required to

pay its employees during the notice period. 5 C.F.R. § 752.404(d)(1). The government points out, as did the presiding official in *Geyman* v. *Department of Labor*, No. AT07528210499 (May 19, 1982), that, if the emergency exception is invalidated, "it will be necessary for the agency, in an emergency situation over which it has no control, to pay the employee during the 30-day notice period in order to furlough that same employee for even one day." The government views such a result as inconsistent with the merit principle that the federal workforce should be used efficiently and effectively, 5 U.S.C. § 2301(b)(5), and, further, as "absurd."[4]

The board disagreed with both characterizations. 24 M.S.P.R. at 74-75. The board pointed out that the merit principles are not self-executing and are only "broad, general declarations of legislative policy" which must give way to the "specific statutory language." *Id.* at 75. In the board's view, the invalidation of the regulation would not work an absurd result. Rather, the plain language of the statute furthers what the board viewed as "a mechanism to allocate the risks of adverse financial consequences between the employee and the agency: that is, during the 30 day notice period, the agency will bear the financial consequences of

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[4] The application of the notice provision to all furloughs would produce anomalous results. To illustrate, a *suspension* of 14 days or less is not subject to the notice requirement. 5 U.S.C. § 7512. In contrast, a *furlough* of 14 days or less, would require notice under MSPB's interpretation. The difference between the two actions is that a suspension is for disciplinary reasons; a furlough for nondisciplinary reasons. Similarly, a "furlough" of 31 days would be deemed a reduction-in-force which, under the statute, requires no notice. While notice is required by regulation, 5 C.F.R. § 351.801, employees need not be *paid* during the 30 days' notice period in an emergency due to lack of work or lack of funds, 5 C.F.R. § 351.807. Since the statutory language can accommodate OPM's interpretation, there exists no reason to require these irrational distinctions.

keeping the employee on the rolls, and, thereafter, the employee bears the consequences of a non-pay status during the furlough period." 24 M.S.P.R. at 74-75 (footnote omitted). The board cited no authority for this statutory purpose, and the government urges that such a purpose would conflict with the Antideficiency Act. Given the alternative readings of the statutory purpose proffered by the government and by the board, we would lean toward that of the government. As neither finds support in the legislative history, though, it would be inappropriate to choose either. Both are based on conjecture, nothing more.

Faced with this conundrum, the *Hastie* board reasoned as follows:

> As discussed above, we cannot find that Congress' actions in this regard have no rational basis. Even if we so found, we conclude that it is inappropriate for the Board to sit as a committee for review and to disregard the order of priorities that Congress consciously selected as reflected in the clear language of the statute at 5 U.S.C. § 7513. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-5, 98 S.Ct. 2279, 2301-2, 57 L.Ed.2d 117 (1980). Under the circumstances of this case, we find that it is incumbent upon the Board to exercise the equivalent of judicial restraint in interpreting the plain language of the statute. *Id.*

24 M.S.P.R. at 75-76.

If we viewed the statutory language in the same vein as the board, we would very likely agree that we should follow the example of the Supreme Court in *Hill* and defer to the plain meaning expressed by Congress. The provisions of sections 7512 and 7513 are, however, not without ambiguity. In *Hastie*, OPM argued that the statutory language was ambiguous. The board rejected that assertion, reasoning as follows:

> In support of its position that the regulation is valid, OPM also contends that Congress intended to require notice and reply rights only for "truly adverse" actions and that furlough actions do not qualify as such

> because they are triggered by a lack of work or funds in contrast to other adverse actions that involve misconduct and are taken for disciplinary reasons. While we agree that furlough actions taken under 5 U.S.C. § 7513 are a hybrid kind of action in the sense that they have a RIF-like basis and are nevertheless subject to adverse action procedures, we cannot agree that these unique characteristics provide any basis for disregarding the clear language of the statutory provisions which define such furlough actions as adverse actions requiring advance notice. For the forty years that the term "adverse action" has existed in civil service law, it has been recognized as a term of art, and we find that OPM's arguments that these furlough actions are not "truly adverse" plainly disregards this fact. For the above reasons, we conclude that OPM's attempts to redefine these furloughs [*sic*] actions are unpersuasive and that this redefinition has no basis in law.

Hastie, 24 M.S.P.R. at 74 (footnote omitted). But what is to the board clear language has not been interpreted as such by OPM. The notice provision of section 7513(b) applies to an adverse action under section 7513(a) which an agency "may take . . . only for such cause as will promote the efficiency of the service." If an emergency furlough action is taken because an agency has no choice, rather than for the "efficiency of the service"—as that term is generally understood—it can reasonably be said that the agency did not "take an action" covered by chapter 75. Thus, the notice provision of section 7513(b) would be inapplicable. *See Federal Personnel Manual*, ch. 752 at 752-9 to 752-11 (1980). Conversely, if a furlough action was not properly taken for emergency reasons, then it is an adverse action. This analysis is comparable to that which we have made in other factual contexts, for example, where the issue is the voluntary or involuntary retirement of an employee, as in *Griessenauer* v. *Department of Energy*, 754 F.2d 361, 364 (Fed. Cir. 1985), and *Covington* v. *Department of Health & Human Services*, 750 F.2d 937, 941 (Fed. Cir. 1984).

We agree with the contention of OPM that there exists in the statute an ambiguity. That being the case, there is room for the regulation, which merely resolves that ambiguity. Accordingly, we uphold 5 C.F.R. § 752.404(d)(2).

IV

The issue of the propriety of use of the emergency furlough regulation is an open question here. For the protection of employees, precipitous action which deprives them of their livelihood must be restricted to very narrow circumstances.[5] OPM asserts here that the agency would have violated 31 U.S.C. § 1341 if the agency had kept petitioners on the payroll. If that proposition is correct, it is a legitimate ground for invoking the emergency furlough regulation. An agency need not presume 30 days in advance that Congress will not fund the agency's work in a timely manner. The matter of whether appropriated funds could be spent on employees who did no work was not decided by the board, and we express no opinion on that issue.

V

For the foregoing reasons, we reverse the decision of the board that 5 C.F.R. § 752.404(d)(2) is invalid. The case is remanded to the board to determine whether the regulation was properly invoked under the circumstances of this case.

REVERSED and REMANDED

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[5] Our upholding the subject regulation does not conflict with the result in *Cuellar* v. *United States Postal Service*, 8 M.S.P.R. 624 (1981). *Cuellar* dealt with an improper *suspension* of an employee during the notice period prior to his removal. *See* 48 Fed. Reg. 19,349 (1983) (OPM's deletion of 5 C.F.R. § 752.404(d)(3) in response to *Cuellar*).

United States Court of Appeals for the Federal Circuit

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

STANLEY ANDRZJEWSKI, ET AL.,

Respondents.

Appeal No. 86-644

NICHOLS, *Senior Circuit Judge,* dissenting.

I regret that, with all respect, I am unable to join in the court's opinion, though I find it somewhat persuasive as to the matters it discusses. I deem it improper to render opinions that are advisory in nature, not dealing with genuine issues, but with those which are moot and fictitious.

The remarkable feature of this case is the ready acceptance the MSPB accorded to the agency assertion that the continuing resolution, H.R.J. Res. 370 hit it with an unforeseeable fiscal emergency, to which the furloughing in issue was the only possible response. The impact of H.R.J. Res. 370 on the agency's funding was a question of law, the decision of which was crucial to the case. The absence of care with which it was actually gone into is illustrated by a fact the court points out, the MSPB's citation of the wrong section of the resolution, one which could not possibly have caused the havoc that ensued. This acceptance of an unsupported, and probably incorrect, legal interpretation is perhaps explained by the fact that the OPM wants to use this case to obtain a holding citable in the very different situation of a total and government-wide lapse of funding, such as has several times occurred as the court points out. So the assertion there was a lapse of funding is accepted uncritically and the desired opinion is obtained. No longer is it necessary to have a true case or controversy if an appellate decision is to be obtained. A careful analysis of the impact of H.R.J. Res. 370 would

have disserved, I think, the real purpose of the present appeal.

I was alerted to inquire into the true text, meaning, and effect of the Rousselot amendment by my inability to comprehend how the section of H.R.J. Res. 370 the MSPB quoted could have the effect imputed to it. Legislative historical material concerning continuing resolutions is hard to come by, as law publishers apparently fail to realize they may generate legal problems of continuing importance. With the cooperation of our fine librarian, the material was obtained and it was only necessary to arrive at a legal conclusion whether H.R.J. Res. 370 achieved a relevant cut off of funds. Because the issue was not briefed or argued, however, I think the MSPB should go into it on remand and not consider itself bound by my unaided analysis. The legal conclusions I set forth hereafter are therefore tentative.

It seems obvious to me that if prohibited work was not done, H.R.J. Res. 370 did not cut off any funds. If this is wrong, we are not shown why. The applicability or relevance of the OPM Regulation, 5 C.F.R. § 752.404(d)(2), is unsupported and simply hangs in the air. If it was not applicable to the case, or relevant to the actual case, its validity is not a real issue, but a fictitious or moot one. We ought not to pass on it, notwithstanding its acceptance by our motions panel in its order of September 5, 1985, which could not have had the light we have, and necessarily accepted as correct the parties' statements as to what the issues were. Such an order cannot be read to require decision of a moot case, yet the court seems to impute such an effect to it.

I am not persuaded that the Rousselot amendment did more than prohibit use of funds to perform certain work. If such work ceased, it said nothing as to whether or not employees who had done that work should still be paid. It looks to me as if the full sum appropriated in the continuing resolution remained available until expended for the salaries of such persons, but we have a live issue only as to the lesser amount needed to pay salaries during the running of the

30-day notice period as Congress intended, what might be called going out of business expense. If the above is not so, we are not shown why. Therefore, the alleged fiscal emergency is a myth, and no proper ground for determining the validity of a regulation which, by its own terms, applies only in cases of emergency. My analysis of the legal issues follows in more detail.

Discussion

I

In my opinion, the first issue to attack in this case is the nature of restrictions imposed on MSHA by the Rousselot amendment as incorporated by reference in H.R.J. Res. 370. Does it prohibit, not only certain regulatory activities, but also continued pay for a 30-day notice period of those who, but for the amendment, would have been performing the prohibited activities? If it does not, it lends less or no support to the validity of the involved furloughs without pay.

It is wrong, as I will show later, to impute to Congress an intent to repudiate entitlements it has itself created unless that intent plainly appears. Some of the presiding officials were astute enough to perceive this, and examining the House Joint Resolution, failed to discover where it prohibited spending any money, within the overall statutory ceiling, for any reasonable and legally authorized purpose. If the "sudden emergency" is not the amendment, it is nothing.

That amendment, as part of H.R.J. Res 370, is to be given the same restraining effect, and no more, as it would have had as part of H.R. 4560, had the latter been enacted into law. Its sponsors intended it to achieve no more than that, and it does not gain a different meaning by being taken from its original context and incorporated by reference elswhere.

Mr. Rousselot, and the Congressmen who voted for his amendment, could not have intended H.R. 4560 to have any immediate effect on the legal right of the persons who had

administered the program to be paid for any pay periods. First, they did not express any such intent in the amendment text or elsewhere. Second, the thrust of their effort was to adjudicate an interagency jurisdictional dispute, not to curtail expenditure, which curtailment, if achieved at all, was a by-product. Third, they did not make any move to adjust the $155,734,000 agency figure downward to take advantage of any saving in payroll to result from their curtailment of the program. Fourth, they must have realized that the effect of their amendment, if it became part of a regular appropriation act such as H.R. 4560 was meant to be, would have been to precipitate moves to dismantle the agency, in whole or in part, including separation of surplus employees, for which substantial money would have been required. For one thing, employees separated without their own fault, and not placed elsewhere, would have been entitled to severance pay, usually for 6 months, a charge on the agency that had employed them. 5 U.S.C. § 5595. Others would have claimed immediate retirement on full annuity. 5 U.S.C. § 8336. For almost all there would be accrued annual leave.

It is a common observation that in the short run in the Federal Government, curtailment of activities with concommitant involuntary separation of employees adds to expenditure instead of reducing it. One who wrongly thought H.R.J. Res. 370 curtailed rights under 5 U.S.C. § 7513(b) would very likely have wrongly thought H.R. 4560 would have curtailed rights under the other statutes mentioned, for example, as to severance pay. I do not think any Congressman of the real world would have intended to attack vested rights in such a manner, and all to no purpose, since the rights in question could have been enforced, even in the absence of appropriation, in the then Court of Claims, and paid out of the open-ended appropriation for paying Court of Claims' judgements. *Ellis* v. *United States*, 657 F.2d 1178 (Ct. Cl. 1981); *Collins* v. *United States*, 15 Ct. Cl. 22, 35 (1879). The mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of

itself defeat a government obligation created by statute. *New York Airways, Inc.* v. *United States*, 369 F.2d 743 (Ct. Cl. 1966). Pay entitlement is for the amount provided for by law, not for the amount appropriated. *French* v. *United States*, 16 Ct. Cl. 419, 422 (1880). Any intent of Congress to change a substantive obligation by a provision in an appropriation must be manifest. *New York Airways*, 369 F.2d at 749. An employee is not required to remain active or perform services to be entitled to active duty pay during a notice period. *Oliver* v. *United States Postal Service*, 696 F.2d 1129 (5th Cir. 1983). A person's entitlement to pay and allowances is so overriding that even a soldier rendering service to the enemy has been held entitled to his lawful pay and benefits until lawfully terminated. *Bell* v. *United States*, 366 U.S. 393, 401-02 (1961).

The fact that the Rousselot amendment was made part of H.R.J. Res. 370, instead of H.R. 4560, does not, as I have shown, either loosen or further straiten its prohibitions. The affirmative action it suggests is different insofar as it might seem precipitate to dismantle the agency upon enactment, in view of the statement of the House Committee that work on the regular appropriations would continue and, as they became law, they would preempt the Continuing Resolution. Thus the discordant Senate position might prevail over the Rousselot amendment. The furlough emerges as a reasonable selection among possible actions. Nothing is added, however, to require disregard of employee's entitlements, among which the 30-day notice of section 7513(b) clearly belongs, with pay while the notice is running. The contrary idea seems founded on the erroneous notion that it is illegal to pay employees their wages and fail to assign them work. *See Oliver*, 696 F.2d at 1131. If they couldn't think of anything lawful for employees to do during a 30-day notice period, they might have sent them home on administrative leave, or kept them at their desks working crossword puzzles, in either case with pay continuing. Nothing in H.R.J. Res. 370 added a prohibition that otherwise did not exist. Any prolonged continuance of pay without work would

doubtless incur criticism, and possibly impair the reputations of the officials responsible, but I cannot specify when payment would become illegal while the appropriation lasted, and the employment was not lawfully suspended, certainly not during a 30-day notice period required by law. The OPM recognizes the legal propriety of a paid, but nonduty, status during the running of a notice period in 5 C.F.R. § 752.404(b)(3)(v).

II

The agency relies, however, on another OPM regulation adjacent in the CFR to the one just cited, 5 C.F.R. § 752.404(d)(2), which is set forth above. In *Hastie* v. *Department of Agriculture*, 24 M.S.P.R. 64 (1984), the MSPB held this regulation to be totally invalid, because in conflict with section 7513(b), as did the MSPB, following *Hastie*, in this case. We should not affirm on such broad grounds. I do not know to what uses the regulation has been or will be put and they might include invoking it in instances of lapse of appropriations and Continuing Resolutions, though it may be obvious the Congress intends to fund the government and the lapse must soon be ended. That is a situation entirely unlike the one we must deal with here, one where ample appropriated funds apparently are available at least for discontinuance expenditures including employee's pay claims. To hold the regulation wholly invalid in such a case, though no case or controversy concerning it is before us, would be an advisory opinion or else judicial legislation.

In my view, the cited OPM regulation, if valid, yet might not apply to the case before us. Clearly it was not a breakdown of equipment, and an Act of Congress is not normally considered an Act of God. What was "unforeseeable" about it? Storm clouds were visible from MSHA headquarters at least as early as House passage on October 6 of Mr. Rousselot's amendment. Several presiding officials properly pointed this out. By the same token, what was "sudden" about it? Where was the "emergency?"

I think if a funding crisis produced by an Act of Congress is within the regulation at all, it must be one to be taken as a *pro tanto* repeal of section 7513(b) because it makes such an intention clear or makes that section legally or practically impossible to comply with. There is nothing to show this is such a case: the financial means of complying with section 7513(b) were apparently provided.

III

The Antideficiency Act, 31 U.S.C. § 1341, as now codified, formerly section 665a, prohibits agency officials from making expenditures or incurring obligations in excess of the amounts appropriated for it, or creating contracts or obligations in anticipation of future appropriations. Officials who violate these constraints are threatened with jail terms or fines by section 1350. The agency argued it would incur section 1350 penalties if it paid furloughed employees for the 30-day notice period, but this argument is based on an interpretation of the Rousselot amendment that I reject. Funds to continue payment during the 30-day notice period were appropriated and available under H.R.J. Res. 370, so long as disapproved work was not done, as it appears to me.

Conclusion

Our review convinces me that if the MSPB was right, it was for the wrong reasons. The terms of the statute, H.R.J. Res. 370, the Continuing Resolution, cannot be read as the MSPB read them, to cut off funding to pay the respondents in question during a 30-day notice period. The opinion of the MSPB does not reflect that the board correctly identified even the portion of the Continuing Resolution that supposedly achieved such an end. Hence, its further implicit finding that "unforeseeable circumstances" existed to trigger application of the OPM Regulation, 5 C.F.R. § 752-404(d)(2), rests on an apparent misinterpretation of H.R.J. Res. 370. MSPB may have thought, however, and possibly meant to say, that a sudden and drastic reduction in work-

load sufficed to be "unforeseeable circumstances" under the regulation, and that according to its terms, it was irrelevant that only work was cut off, not funds.

Unless the regulation is determined to control the result if it is valid, the board cannot properly assert it is invalid, as it has done. This court should not consider the validity of the regulation when it is not satisfied that it pertains to the case.

The board does not mention the Antideficiency Act, 31 U.S.C. § 1341, which OPM relies on; however, that Act does not have a bearing if, as it appears to me, funds to pay respondent employees had been appropriated and paying them would not produce a deficiency.

I might have come to the same conclusion as the board respecting the rights of respondent employees, but it would have been on different grounds owing to our different interpretation of H.R.J. Res. 370. In the circumstances, the appropriate thing to do is not to affirm, but to vacate and remand, and this I would do. I would instruct the board to take testimony by persons knowledgeable about United States Government appropriation, funding, and accounting matters, and ascertain whether the respondent employees could have been paid during the notice period, if not, why not, and if they could have been, whether any other circumstances were "unforeseeable circumstances" or an "emergency" under the regulation. The board should then determine whether the involved OPM Regulation was really relevant to the case at all, and only if it was, whether the regulation was invalid. This court should not pass upon the validity of the regulation as a whole in such an atypical context upon mere speculation that such a determination might be necessary.

Appendix B .

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STANLEY ANDRZJEWSKI, *et al.*	DOCKET NUMBER PH07528210189
v.	
DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION	Date: 0 1 NOV 1984

OPINION AND ORDER

INTRODUCTION

These appeals are currently before the Board on petitions for review filed by the agency[1] and appellants[2] from initial decisions issued by presiding officials in seven of the Board's regional offices.[3] The issues presented in these appeals con-

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[1] The agency has filed a consolidated petition for review from the initial decisions issued by presiding officials in the Board's Dallas, Denver, St. Louis, Seattle and Philadelphia Regional Offices. The appellants whose appeals were initially decided by these offices are listed in Appendix I.

[2] Appellants have filed petitions for review from the initial decisions issued by the Board's Atlanta and Chicago Regional Offices. The appellants whose appeals were initially decided by these offices are listed in Appendix II.

[3] By Order dated June 15, 1982, the Board consolidated the appeals of the cases heard by the Board's St. Louis, Dallas, Denver, and Philadelphia Regional Offices. Pursuant to its authority under 5 C.F.R. § 1201.36(a), the Board hereby consolidates those appeals with the appeals heard by the Board's Atlanta, Chicago and Seattle Regional Offices since these latter appeals contain issues identical to those presented in the previously consolidated appeals.

cern the validity of a purported "emergency" thirty day furlough without pay of the appellants which occurred from January 4 — February 3, 1982. The furlough resulted from a prohibition contained in House Joint Resolution No. 370, Pub. L. No. 97-92, 95 Stat. 1183, 1199 (1981), which forbade the Mine Safety and Health Administration (agency) from obligating or expending funds:

> to prescribe, issue, administer or enforce any standard, rule, regulation or order under the Federal Mine Safety and Health Act of 1977 with respect to any independent construction contractor who is engaged by an operator for the construction, repair or alteration of structures, facilities, utilities or private ways or roads located on (or appurtenant to) the surface areas of any coal or other mine, and whose employees work in a specifically demarcated area, separate from actual mining or extraction activities: Provided, That no funds shall be obligated or expended to prescribe, issue, administer or enforce any standard, rule, regulation or order under the Federal Mine Safety and Health Act of 1977 on any State or political subdivision thereof.

Both the Office of Personnel Management (OPM) and the Office of Management and Budget (OMB) have filed briefs as intervenors.[4]

The petitions for review are GRANTED.

FACTS

On December 15, 1981, Congress passed a Continuing Resolution which provided for the continued funding of the agency and other government programs for the period of December 16, 1981, to March 31, 1982. Although the agency was funded at its full funding level, the resolution prohibited the expenditure of any funds for the agency's surface mining

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[4] OMB was granted permission to intervene in this proceeding by Order dated October 27, 1982.

enforcement program. This resolution was similar to language in H.R. 4560, passed by the House of Representatives on October 7, 1981, which also provided that no funds be expended for certain activities required by the Federal Mine Safety and Health Act of 1977.

As a result of the joint resolution, the Acting Administrator for Metal and Nonmetal Mine Safety and Health issued a 30 day furlough notice to each appellant on December 18, 1981. The notice advised each appellant that he or she would be furloughed effective January 3, 1982, for a period not to exceed February 2, 1982. The notice stated that neither a thirty day advance written notice nor any opportunity for reply to the notice was required because the action was taken pursuant to the "emergency" furlough provisions of 5 C.F.R. § 752.404(d)(2). This section provides that:

> [t]he advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

Appellants were furloughed without pay effective January 3, 1982 for a thirty day period ending on February 2, 1982. Each appellant filed a petition for appeal with one of the Board's regional offices. Hearings were held by several of the presiding officials. Several presiding officials found that the agency had supported the underlying decision to furlough the appellants by a preponderance of the evidence. However, presiding officials in five of the regional offices reversed the furlough actions holding that the agency had committed assorted harmful errors. Further, several presiding officials held that 5 C.F.R. § 752.404(d)(2) (1982) was an invalid regulation, because it was inconsistent with 5 U.S.C. § 7513(b) and the Board's interpretation of that statutory

provision in *Cuellar* v. *U.S. Postal Service*, 8 MSPB 282 (1981).[5]

On the other hand, two presiding officials sustained the agency action, finding, in substance, that invocation of 5 C.F.R. § 752.404(d)(2) was proper because the Congressional action was unforeseeable and not within the discretion of the agency. Therefore, they held that thirty days advance notice and an opportunity to reply were not required.

ARGUMENTS OF THE PARTIES.

In its petition for review, the agency contends that the presiding officials who reversed the action erred, because the requirements of 5 C.F.R. § 752.404(d)(2) are applicable to this action as the furlough was caused by a sudden emergency caused by forces outside the control of the agency which interfered with the normal functions of the agency and severely handicapped the agency's ability to perform those functions that the employees were hired to perform. It therefore argues that the Board's decision in *Cuellar*, which concerned an action taken by the agency pursuant to its discretion, is inapplicable. Further, it contends that the initial decisions reversing the actions would require the agency to violate the Anti-Deficiency Act, 31 U.S.C. § 665(a)

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[5] In *Cuellar*, the Board invalidated 5 C.F.R. § 752.404(d)(3), finding that Congress intended that the thirty day advance written notice period was not required only in cases where the employee had committed a crime for which a sentence of imprisonment might be imposed. The regulation invalidated in *Cuellar* permitted an agency to waive the thirty day notice period when the circumstances were such that retention of the individual during the notice period might be injurious to the employee or his coworkers, might result in damage to government property, or because the nature of the employee's offense might reflect unfavorably on the public perception of the service.

(1980)[6] because the agency would be required to expend funds although its appropriation had lapsed. Finally, it contends that the presiding official in the Dallas Regional Office[7] erred when he found that the agency failed to sufficiently show that an emergency situation existed which would trigger the invocation of 5 C.F.R. § 752.404(d)(2).

In their response to the agency petition and in their petition for review, appellants have taken the position that: (1) 5 C.F.R. § 752.404(d)(2) is invalid because it is inconsistent with 5 U.S.C. § 7513 and the Board's ruling in *Cuellar, supra;* (2) the prohibition contained in the Anti-Deficiency Act is not applicable to this appeal, but even if it was applicable, the Civil Service Reform Act would require that the appellants be paid during the notice period; and (3) the presiding official in the Dallas Regional Office correctly found that there were no unforeseeable circumstances which permitted the agency to dispense with the 30 day advance notice period.

In its Memorandum in Support of Intervention, OPM supports the agency arguments and primarily contends that 5 C.F.R. § 752.404(d)(2) is a valid and enforceable interpretation of 5 U.S.C. § 7513 and must be evaluated under a different standard than that used by the Board in *Cuellar.*

Finally, OMB requests that the Board find that the OPM regulation is valid since the provision is central to the orderly shutdown of agency operations necessitated by funding lapses. It also alleges that the presiding official in the Board's Philadelphia Regional Office erred in finding that the Civil Service Reform Act provides an exception to the prohibition of the Anti-Deficiency Act.

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[6] This Act was amended by P.L. 97-258, 96 Stat. 923 (September 13, 1982) and is now found at 31 U.S.C. § 1341. The new Act adds the District of Columbia government to the spending and expenditure prohibition contained therein.

[7] *Pedroza, et al. v. Department of Labor,* MSPB Docket No. DA07528210300 (May 18, 1982).

ANALYSIS

Pursuant to 5 U.S.C. § 7513, adverse action procedures must be followed in effecting a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of thirty days or less against an employee in the competitive service or who is a preference eligible employee under 5 U.S.C. § 7511. "Furlough" is defined at 5 U.S.C. § 7511(a)(5) as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary reasons." The record supports the finding made by several of the presiding officials that the passage of the joint resolution caused a decrease in the agency workload justifying the adverse action furlough in these appeals.

In *Hastie* v. *Department of Agriculture*, MSPB Docket No. DA07528210615 (November 1, 1984), also issued today, we found that the regulation under which authority this action was taken, 5 C.F.R. § 752.404(d)(2), is inconsistent with 5 U.S.C. § 7513(b), and that the regulation is invalid. OPM exceeded its statutory authority in promulgating this regulation. Therefore, although the agency has supported its charges by a preponderance of the evidence, the furloughs at issue can not be sustained because they were not in accordance with law. 5 U.S.C. 7701(c)(2)(c).

In making our determination in *Hastie*, the Board first reviewed the Veterans Preference Act of 1944 (the Act)[8] and its legislative history. Under the express language of section 14 of the Act, preference eligibles who were subject to adverse actions, including furlough without pay, were entitled to 30 days' advance notice, an opportunity to reply and a written decision. These actions could only be taken for such cause as would promote the efficiency of the service and employees were granted an appeal right to the former Civil Service Commission. The only exception to the 30 days' advance notice was the "crime exception" which was sub-

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[8] Ch. 287, 58 Stat. 387, currently codified at 5 U.S.C. § 3501.4.

stantially identical to the crime exception now codified at 5 U.S.C. § 7513(b)(1).

The legislative history of the Act, although not giving reasons for expanding the definition of adverse action to include furloughs, expressed a Congressional intent to limit the power of the executive branch to regulate adverse actions if such regulations resulted in derogation of the rights and protections afforded to preference eligibles in the federal service.

We therefore concluded that the Civil Service Commission's emergency furlough regulation, issued within months of the Act, was inconsistent with section 14 of the Act.

We further found, in *Hastie*, *supra*, after considering the relevancy of the pre-Civil Service Reform Act of 1978 (CSRA) history of the emergency furlough regulation to the validity of the current regulation, that the clear language of the CSRA and its legislative history evidenced a Congressional intent to reduce the 30 days' advance notice period for adverse actions only when the crime provision was applicable. The emergency furlough regulation was found to be clearly inconsistent with the statute and therefore invalid.[9]

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[9] In *Hastie*, at 12-17, the Board rejected several other arguments adduced by OPM concerning the validity of the emergency furlough regulation. Those arguments were: (1) OPM's interpretation of the statute, as embodied in the emergency furlough regulation, is not clearly prohibited by the statutory terms or by the legislative history; (2) Congress intended to require advance notice and reply provisions only for "truly adverse" actions and furlough actions do not qualify as such because they are taken for reasons not personal to the employee and constitute a hybrid type of action with a RIF-like basis; (3) the provision of advance notice in an emergency furlough action serves no purpose since neither the employee nor the agency has the power to change the emergency conditions which triggered the action; (4) providing employees in emergency furlough actions with 30 days' notice is not an efficient or effective employment practice and is therefore

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For the foregoing reasons, the Board found that 5 C.F.R. § 752.404(d)(2) exceeds OPM's statutory authority since it is inconsistent with 5 U.S.C. § 7513(b) and is invalid. Since the furlough actions in this appeal were taken under the authority of an invalid regulation, they are not in accordance with law. 5 U.S.C. § 7701(c)(2)(C.).[10]

The Board has previously held that where adverse actions are taken without adherence to any of the procedural requirements of 5 U.S.C. § 7513, such an omission constitutes clear harmful error under 5 U.S.C. § 7701(c)(2)(A). *Baracco* v. *Department of Transportation*, MSPB Docket No. DC075281F0895 (April 25, 1983; *Cuellar, supra*; *Kerr* v. *National Endowment for the Arts*, 5 MSPB 299, (1981); *Morrow* v. *Department of the Army*, 4 MSPB 494, 497 (1980); *White* v. *Department of the Treasury*, 4 MSPB 11, 13 (1980). Since the agency deprived each of the appellants of any written notice and did not allow them to furnish a reply to the notice of proposed furlough, the Board finds harmful error.[11]

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inconsistent with the merit principle found at 5 U.S.C. § 2301(b)(5); and (5) in construing Congressional intent with regard to furloughs, the Board should give substantial weight to pre-existing civil service regulations and policy, as it did in *National Treasury Employees Union* v. *Office of Personnel Management*, 9 MSPB 448 (1982).

[10] Since the Board finds 5 C.F.R. § 752.404(d)(2) to be an invalid regulation, it need not consider the other arguments raised by the parties in their respective petitions for review.

[11] The Board notes that furloughs of more than 30-days are treated as reductions-in-force ("RIF") actions. There is no statutory requirement for advance notice in such actions. 5 U.S.C. §§ 3501-4. OPM regulations do provide for 30 days advance notice in RIF actions 5 C.F.R. § 351.801(a)(1983). However, in cases of emergency, when an agency lacks funds or work, OPM regulations provide that the agency may furlough employees for more than 30 days, utilyzing (sic) RIF procedures, and place the

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Accordingly, the initial decisions issued by the Atlanta Regional Office on May 19, 1982,[12] and by the Chicago Regional Office on May 28, 1982 are hereby REVERSED. The initial decisions issued by the Philadelphia Regional Office on May 7, 1982, the Dallas Regional Office on May 18, 1982, the Denver Regional Office on May 17, 1982, the Seattle Regional Office on June 2 and June 7, 1982, and those issued by the St. Louis Regional Office are AFFIRMED as MODIFIED.

The agency is hereby ORDERED to cancel the furlough of each appellant listed in Appendices I and II. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of the issuance of this opinion.

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employee on annual leave, leave without pay, or a nonpay status for all or part of the notice period. 5 C.F.R. § 353.807. Since there is no statutorily mandated notice period in RIF actions, OPM may properly provide exceptions to its own regulatorily created notice requirement.

In the instant situation, the furlough did, in fact last more than thirty days. Assuming that the agency could have established the existence of an emergency situation during the notice period, it could have employed RIF procedures, furloughed appellants for more than 30 days, given each appellant 30 days advance notice, and placed appellants in a nonpay status for all or part of the notice period. However, since the agency chose instead to utilize adverse action procedures, its failure to accord appellants any of the procedural requirements of 5 U.S.C. § 7513 constitutes clear harmful error under 5 U.S.C. § 7701(c)(2)(A).

[12] The presiding official in the Atlanta Regional Office denied appellants' request for a hearing because there were no facts at issue. This finding is erroneous. Section 7701(a) of Title 5, U.S. Code clearly provides that an appellant is entitled to a hearing before this Board in any appeal brought under that section. *See Hein v. Office of Personnel Management*, 1 MSPB 396 (1980). However, since the Board is reversing the initial decision in this case, the appeal need not be remanded to the Regional Office.

Any petition for enforcement of this Order shall be made to the appropriate Regional Office in accordance with 5 C.F.R. § 1201.181(a). This is the final decision of the Merit Systems Protection Board in these appeals. 5 C.F.R. Sec. 1201.113(c).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W. Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Stephen E. Manrose
Acting Clerk of the Board

Washington, D.C.

Appendix C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EVERT L. HASTIE and DAVID P. LOWE, *appellants* v. DEPARTMENT OF AGRICULTURE, FEDERAL GRAIN INSPECTION SERVICE, *agency*.	DOCKET NUMBERS DA07528210615 DA07528210616 DATE: 01 NOV 1984

OPINION AND ORDER

By notices dated June 22, 1982, the appellants were placed on a furlough without pay status from their positions of Agricultural Commodity Graders, for a period not to exceed 30 days. The furlough actions were effective June 27, 1982. The appellants timely appealed these actions to the Board's Dallas Regional Office, contending, *inter alia*, that the actions were improper because they had not received 30 days' advance notice of the actions, as required by 5 U.S.C. § 7513(b).[1] In response, the agency asserted that the furlough

[1] 5 U.S.C. § 7513 sets out the procedures applicable to actions specified in 5 U.S.C. § 7512 (removals, suspensions for more than 14 days, reductions in grade, reductions in pay, and furloughs of 30 days or less). Sections 7513(b)(1) and (2) provide that an employee is entitled to "at least 30 days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;" and "a reasonable time, but not less than 7 days to answer orally and in writing . . ."

actions resulted from a lack of work caused by an unforeseeable strike at the Far-Mar-Co grain elevator which obviated the need for the appellants' services, and that the agency was thus authorized under 5 C.F.R. § 752.404(d)(2)[2] to take the actions without affording the appellants 30 days' advance notice and an opportunity to respond.

In separate initial decisions dated January 27, 1983 and February 24, 1983 the presiding official reversed the furlough actions, finding that the emergency furlough exception provided for in 5 C.F.R. § 752.404(d)(2) was invalid because it was inconsistent with the express language of 5 U.S.C. § 7513(b)(1). In considering the validity of the regulation, the presiding official found that the Board's decision and reasoning in *Cuellar* v. *U.S. Postal Service*, 8 MSPB 282 (1981) was dispositive. In *Cuellar* the Board invalidated a similar type of emergency regulation, 5 C.F.R. § 752.404(d)(3) (1981), which authorized agencies to take suspension actions without notice when the retention of the employee in an active duty status during the notice period pending removal or indefinite suspension might be injurious to the employee, fellow workers, or the general public, might damage government property; or because the nature of the employee's offense might reflect unfavorably on the public perception of the service. In *Cuellar*, the Board held that in passing the Civil Service Reform Act of 1978, Pub. L. 94-954, 92 Stat. 1111 (the Reform Act), Congress had maintained the crime exception contained in 5 U.S.C. § 7513(b)(1) as the only exception to the 30 day advance notice requirement and that nothing in 5 U.S.C. § 7514 authorized the Office of Personnel Management (OPM) to add further

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[2] This regulation (hereinafter referred to as the emergency furlough regulation) provides that:

> The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

exceptions over and above the one statutory exception *Cuellar, supra* at 284-7. As in *Cuellar*, the presiding official in the instant appeals found that the actions were taken under an invalid regulation and were therefore not in accordance with law. 5 U.S.C. § 7701(c)(2)(C). *Lowe* Initial Decision (I.D.) at 8; *Hastie* I.D. at 6.

The agency has filed timely petitions for review of the initial decisions, contending that Congress intended to keep the emergency furlough regulation intact in enacting the Reform Act, and that the Board's holding in *Cuellar, supra*, is inapplicable. The appellants have responded to the agency's petitions, contending that the regulation is invalid and was also improperly invoked because the agency could have foreseen the strike.[3] Although OPM has not filed a request to intervene in these appeals, OPM has intervened in two initial decisions involving the validity of the same regulation. *Andrzjewski* v. *Department of Labor*, MSPB Docket No. PH07528210189 (November 1, 1984); *Geyman* v. *Department of Labor*, MSPB Docket No. AT07528210499 (May 19, 1982). In the interests of considering all the issues relevant to these appeals, we find it appropriate to consider OPM's contentions regarding the validity of the regulation in these appeals. Since the instant appeals of Evert L. Hastie and David P. Lowe involve the issue of the validity of the same regulation and involve substantially similar facts, the appeals are hereby consolidated. 5 U.S.C. § 7701(f); 5 C.F.R. § 1201.36(a).

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[3] In support of their contention that the strike was foreseeable, the appellants offer an agency memorandum dated May 28, 1982 ,which states that it was rumored that Far-Mar-Co. would go on strike on June 1st but that the strike was postponed for 30 days. Appellants' Response to Petitions, Exhibit B. Since the appellants did not timely petition for review concerning the issue of whether the regulation was properly invoked and have made no showing that this evidence was unavilable despite due diligence, the Board will not consider their arguments in this regard. *Jackson* v. *Department of Transportation*, 5 MSPB 95 (1980).

Pursuant to 5 U.S.C. § 7701(e)(1), the agency's petitions for review are hereby GRANTED.

HISTORY OF THE REGULATION FROM 1938-1978

In order to fully consider the parties' contentions regarding the validity of the emergency furlough regulation, 5 C.F.R. § 752.404(d)(2), we find that it would be appropriate to first outline the history of this regulation until the Reform Act was enacted. A precursory form of both the emergency furlough and emergency suspension regulation appeared in 1938 in the Civil Service Commission's regulations governing adverse actions. These regulations authorized agencies to take both furlough and suspension actions without advance notice, an opportunity to reply, and a written decision specifying the reasons for the action. 5 C.F.R. § 12.101(d) (1938). The latter procedural requirements were applicable to removal actions and to some extent, to reductions in rank or compensation in the competitive service under the Lloyd-LaFollette act of 1912, but that Act made no provision for furlough actions.[4] With the advent of the economic depression in the 1930's, furloughs without pay were widespread and such furlough actions were specifically authorized by a series of emergency statutes passed in 1932-4 known as the "Economy Acts." These acts required employees to continue working during furlough periods and also required salary reductions ranging from 15 to 5 percent. According to the Commission, certain provisions of these acts were controversial, caused severe hardship, and lowered the morale of the federal workforce.[5] The only substantive or procedural limitation which the Economy Acts placed on

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[4] Ch. 389, 37 Stat. 555 (August 24, 1912). Also, see note 8, *infra*.

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[5] USCSC, Biography of An Ideal at 77, 138-9 (1959); USCSC, History of the Federal Civil service 1789 to the Present at 119-21 (1941). One provision of the Economy Act of 1932 which

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furlough actions was the requirement that civil service laws and regulations be observed in effecting furloughs of more than 90 days in fiscal year 1934. This provision was interpreted as a requirement that veterans preference applied to such furlough actions.[6]

With the passage of the Veterans Preference Act of 1944,[7] furlough actions were, for the first time, subject to the same procedural requirements as removals and other adverse actions, at least as to actions against preference eligibles covered by this act.[8] Section 14 provided that preference eligibles who were "discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment" were entitled to 30 days' advance notice, an opportunity to

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received national attention was section 213 which provided that, in the event of reductions in force, employees whose husbands or wives were also in the federal service or District of Columbia service should be dismissed first. Ch. 314, 47 Stat. 382, 406. Nearly every provision of the Economy Acts, including section 213, was repealed by 1937.

[6] Economy Act of 1932, 48 Stat. 13, § 216. In an unpublished opinion issued on December 4, 1929 (quoted in 37 Op. Atty Gen. 167, 173-4), the Attorney General concluded that the then existing veterans preference statutes required the observance of veterans preference in furlough actions because such actions were, in effect, partial dismissals. Following the enactment of the Economy Act of 1932, the attorney general reconsidered the 1929 opinion and concluded that, in light of the clear terms of section 216, veterans preference was applicable to furloughs of more than 90 days but need not be observed in furlough actions of less than 90 days. 37 Op. Atty Gen. 167 (June 24, 1933).

[7] Ch. 287, 58 Stat. 387, currently codified at 5 U.S.C. §§ 3501-4. Hereinafter cited as the Veterans Preference Act.

[8] The Veterans Preference Act did not repeal those provision (sic) of the Lloyd-LaFollette Act which applied to employees in the competitive service and required advance notice and related

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reply and a written decision. Section 14 further provided that such actions could only be taken for "such cause as will promote the efficiency of the service" and provided for an appeal right to the Commission. The only exception which the Veterans Preference Act provided to the advance notice requirement was the crime exception, based on a "reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed."[9] In section 12, the Act provided for preferences in reduction-in-force (RIF) actions, and a continuation and expansion of the preferences afforded by existing statutes, but section 12 contained no requirement for advance notice as to RIF actions.

There are no comments in the legislative history of the Veterans Preference Act which explain the specific reasons that Congress expanded the scope of adverse actions to include furlough actions, but it is clear that a dominant legislative purpose of the act was to expand upon the preferences already afforded to veterans under existing statutes, regulations, and executive orders.[10] Additionally, it is clear that Congress intended to limit the power of both the Commission and the President to regulate preference provisions in federal employment in order to ensure that preferences

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procedures for removals and other actions. Those provisions continued in force. 5 U.S.C. § 652 (1964); 5 U.S.C. § 7501 (1970). Thus, removals of preference eligible employees in the competitive service were covered by both the Lloyd-Lafollette Act and the Veterans Preference Act, although only the latter granted an appeal right to the Commission. In 1962, Executive Order 10988 extended the application of Section 14 of the Veterans Preference Act to all federal employees in the competitive service, except probationary employees and non-veterans in the excepted service.

[9] The language of the crime exception in section 14 of the Veterans Preference Act is substantially identical to the crime exception which Congress reenacted in the Civil Service Reform Act. *See* 5 U.S.C. § 7513(b)(1).

[10] S. Rep. No. 907, 78th Congress, 2nd Sess. 1 (1944).

granted under existing regulations and executive orders were not eliminated, and to ensure that the Commission did not issue regulations that were inconsistent with the act's expressed purpose of expanding preference provisions in federal employment.[11] These concerns were expressed in both the General Statement[12] that accompanied the bill when it was reported out of the Senate committee and in two

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[11] *See Hearings on S. 1762 ands H.R. 4115 Before the Senate Committee on Civil Service*, 78th Cong., 2d Sess. at 47-51; 57-8 (1944). During the hearings on H.R. 4115, there was considerable discussion on the issue of whether it was desirable to develop a listing of all the executive orders and the Commission's regulations which were relevant to preferences in federal employment and to review and approve these provisions. Id. at 49-51, 57-8. At one point, Senator Langor asked the then Commissioner of the Civil Service Commission why Congress could not simply include those executive orders it believed were desirable in the bill and "repeal the rest of them," and the Commissioner responded that he would have to give the question further consideration. Id. at 50. At another point in this discussion, a representative of one of the three veterans organizations that assisted in drafting the bill offered his opinion that executive orders that were inconsistent with the bill would automatically be cancelled (when the bill was passed). *Id.* at 57.

[12] The General Statement included the following language:

> Congress has long recognized the desirability of granting preference in governmental employment to former members of the military and naval forces. In the past, however, veterans' preference laws have consisted for the most part of little more than broad statements of general principles, leaving details of application and administration to Executive Orders and regulations. The enactment of H.R. 4115, known as the Starnes-Scrugham bill would for the first time bring together in comprehensive statutory form the various statutes as well as the *desirable provisions of Executive orders and regulations* promulgated pursuant thereto. In addition, the bill provides for certain preferences not accorded veterans under existing law. (Emphasis supplied.) S. Rep. No. 907, 78th Congress, 2nd Sess. 1 (1944).

sections of the act itself. Section 18 provided that the act shall not be construed to take away any rights granted to preference eligibles under any existing law, executive order, civil-service rule or regulation. Section 19 stated that the Commission had the duty and authority, with respect to the classified service, to make and enforce "appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this act . . . ."

Within a few months after the Veterans Preference Act was passed, the Commission issued regulations governing adverse actions, reductions in force and appeals under the act, and these provisions included an emergency furlough regulation which is substantially identical to the emergency furlough regulation currently in force and at issue in these appeals. *Compare* 5 *C.F.R.* § 22.2(c) (1944) [13] and 5 C.F.R. § 752.404(d)(2) (1983) (set out at note 2, *supra*). The Commission's 1944 regulations also bifurcated furloughs into adverse action furloughs and RIF furloughs, defining furloughs actions of more than 90 days as RIF actions and providing that furloughs of shorter duration would be subject to adverse action procedures.[14] *See* 5 C.F.R. § 12.303(a) and 22.1(b) (1944).

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[13] The 1944 emergency furlough regulation provided that: "[I]n cases of furlough without pay due to unforeseeable circumstances such as sudden breakdowns in equipment or acts of God, advance notice shall not be necessary." With minor changes, the regulation continued in force to the present time.

[14] The Commission provided no explanation in its 1944 regulations for establishing this bifurcated scheme for furlough actions. It may be that the regulations reflected the Commission's interpretation of the 1933 Attorney General's opinion, finding that furloughs in excess of 90 days taken under the 1932 Economy Act were subject to statutes providing for veterans' preference in retention. *See* note 6, *supra*. In 1945 the Commission changed its regulations to provide that furloughs in excess of 30 days were RIF actions while furloughs of shorter duration were subject to adverse action procedures. 5 C.F.R. § 12.302(a) (1945). This

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Given the clear language in section 14 of the Veterans Preference Act requiring notice and reply rights in furlough actions (regardless of their length), the validity of the 1944 emergency furlough regulation is questionable. We find highly improbable that Congress intended to authorize the Commission to issue this regulation, since the regulation took away some of the specific procedural protections which Congress had just enacted for furlough actions. This conclusion is buttressed by the legislative history of the Veterans Preference Act, which clearly demonstrates that Congress intended to limit the power of the executive branch to regulate in this area if such regulations resulted in the derogation of the rights and protections afforded to preference eligibles in federal employment. We also find it significant that Congress in 1944 was presumably aware of the emergency economic conditions that led Congress in 1932 to enact legislation authorizing emergency furlough actions. Despite this historical and legislative backdrop, Congress nevertheless made no provisions for emergency exceptions to the notice and reply requirements it placed on furlough actions. Finally, we note that if Congress ever intended any emergency conditions to override the notice and reply requirements, Congress pointedly ignored two readily available alternatives which were clearly presented by the very structure of the legislation that it enacted. For example, Congress could have defined furlough actions as RIF actions in section 12, and since this section made no provisions for notice and reply rights,[15] none would have been required by sta-

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regulatory bifurcation of furlough actions continued until the Reform Act, when Congress statutorily limited adverse action furloughs to actions of 30 days or less. 5 U.S.C. § 7512.

[15] In the 1950's, a number of courts considered the issue of whether furlough actions taken under RIF procedures and other RIF actions were improper under the Veterans Preference Act if the employee was not provided with 30 days' notice with pay. *Baxter* v. *United States*, 129 Ct. Cl. 254, 136 F. Supp. 748, *cert. den.*, 350 U.S. 936, 100 L.Ed. 817, 76 S. Ct. 308 (1954); *Ashley* v.

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tute, even in non-emergency situations.[16] Alternatively, Congress could have drafted another exception to the advance notice requirement for adverse actions in addition to the crime exception it had already created. Congress chose neither of these alternatives and otherwise made no provision for any emergency exceptions to the notice and reply requirements. Given these facts, we find that the Com-

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Ross, 89 U.S. App. D.C. 339, 191 F.2d 655 (1951); *Fass* v. *Gray*, 197 F.2d 587 (U.S. App. D.C.), *cert. den.* 344 U.S. 839, 97 L.Ed. 653, 73 S. Ct. 39 (1952); *Leeds* v. *Russell*, 101 F. Supp. 481 (D.N.Y. 1951). In considering this issue, these courts drew a clear distinction between section 14 of the Veterans Preference Act, which covered adverse actions and required advance notice, and section 12, which covered RIF actions and required no notice: These courts held that furlough actions taken under RIF procedures and other RIF actions required no advance notice since section 12, rather than section 14, applied to such actions. In *Ashley*, the court considered the issue of whether the agency could place the employee in a non-pay status during the 30 day notice period for a RIF furlough action and concluded that such action was not improper under section 12. In construing section 12, the court stated that it could not ascribe an intent to Congress to require 30 days' notice with pay in the absence of work or funds, but this statement is inapposite to the issue in the present appeals since *Ashley* involved a RIF furlough taken under section 12, which made no provisions for advance notice.

[16] Both in 1944 and to the present day, the Commission has, by regulation, provided for 30 days' advance notice in RIF actions, but these regulations have also authorized agencies to place employees in a non-duty status during the notice period when, due to an emergency, the agency lacks funds or work during that period. 5 C.F.R. § 12.333 (1944) and 5 C.F.R. § 351.807 (1983). Since this regulation relates to the employee's pay status during the notice period and does not authorize the agency to eliminate or shorten the 30 day notice period, the regulation is not really comparable to the emergency furlough regulation. In addition, as we have previously noted, there is no statutory requirement for advance notice in RIF actions. 5 U.S.C. §§ 3501-4.

mission's emergency furlough regulation, as it existed before the Reform Act, was inconsistent with section 14 of the Veteran's Preference Act which required notice and reply rights for all furlough actions.

The Effect of the Reform Act on the Emergency Furlough Regulation

While we find that the Pre-Reform Act history of the emergency furlough regulation is certainly relevant to the issue of whether the current regulation is valid, we also recognize that it is not dispositive of this issue, since Congress, in passing the Reform Act, may have evidenced an intent to keep the regulation intact.

Both the agency and the Office of Personnel Management[17] (OPM) contend that Congress was aware of the emergency furlough regulation and intended to keep it intact, and that the Board's ruling in *Cuellar, supra,* is not applicable. In support of this position, they argue that: (1) OPM's interpretation of the statute, as embodied in the emergency furlough regulation, is not clearly prohibited by the statutory terms or by the legislative history; (2) Congress intended to require advance notice and reply provisions only for "truly adverse" actions and furlough actions do not qualify as such because they are taken for reasons not personal to the employee and constitute a hybrid type of action with a RIF-like basis; (3) the provision of advance notice in an emergency furlough action serves no purpose since neither the employee nor the agency has the power to change the emergency conditions which triggered the action; (4) providing employees in emergency furlough actions with 30 days' notice is not an efficient or effective employment practice and is therefore inconsistent with the merit principle found at 5 U.S.C. § 2301(b)(5); and (5) in construing Congres-

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[17] For the reasons discussed earlier, the Board finds it appropriate to consider OPM's contentions concerning this regulation although OPM has not intervened in these appeals.

sional intent with regard to furloughs, the Board should give substantial weight to pre-existing civil service regulations and policy, as it did in *National Treasury Employees Union* v. *Office of Personnel Management*, 9 MSPB 448 (1982), and find the emergency furlough regulation valid on this basis.

At the outset, we note that in passing the Reform Act, Congress expressly defined a "furlough of 30 days or less" as an adverse action,[18] and provided that employees against whom adverse actions were taken were entitled to at least 30 days' advance written notice; a reasonable time, but not less than 7 days, to answer; and a written decision specifying the reasons. 5 U.S.C. § 7513(b). The only exception Congress made to the advance notice requirement was the crime exception. Given the clear language of 5 U.S.C. § 7513(b) and the legislative history that is pertinent to this provision,[19] we find that the emergency furlough regulation is clearly inconsistent with the statute since it provides an additional exception to the advance notice requirement that is not either expressly or implicitly authorized by the statute. *See Cuellar, supra.*

While OPM and the agency apparently concede this inconsistency, they point to the fact that the statute does not expressly prohibit OPM's interpretation and the legislative history contains no suggestion that Congress disapproved of the emergency furlough provision. While we recognize that OPM's contemporaneous interpretation of the statute is entitled to substantial deference since OPM is the agency

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[18] Sec. 204 of the Reform Act; *see also* 5 U.S.C. § 7512.

[19] *See* S. Report No. 969, 95th Cong., 2nd Sess. 50 (1978) stating that the 30-day notice period is one of "the minimum rights of an employee against whom an adverse action is proposed." "The 30-day period may be reduced *only* when there is reasonable cause to believe the employee is guilty of a crime for which a sentence of imprisonment can be imposed." (Emphasis supplied).

charged with making regulations regarding chapter 75,[20] we find that the failure of Congress to expressly disapprove of the regulation or otherwise proscribe it is entitled to little weight under these circumstances. First, we note that Congress enacted only one exception to the notice and reply requirements for adverse actions, and, as a general rule of *statutory construction, the expression of one exception indicates that no other exceptions* apply. *See* 2A C. Sands, Sutherland Statutory Construction §§ 47.11, 47.23 (4th ed. 1973). Second, while the failure of Congress to *disapprove of the regulation should* be considered, it has generally been recognized that such *inaction is a far cry from approval.* 1 K. Davis, Administrative Law Treatise § 5.07 at 334-5 (1958).[21] More importantly, it is also generally recognized that although Congressional reenactment of a statute can strengthen a regulation's claim to validity, reenactment cannot save a regulation which contradicts the requirements of the statute itself, as is the case here. *Commissioner of Internal Revenue* v. *Acker*, 361 U.S. 87, 93, 80 S.Ct. 144, 4 L.Ed. 2d. 127 (1959).

In support of its position that the regulation is valid, OPM also contends that Congress intended to require notice and reply rights only for "truly adverse" actions and that furlough actions do not qualify as such because they are triggered by a lack of work or funds in contrast to other adverse actions that involve misconduct and are taken for disciplinary reasons. While we agree that furlough actions taken under 5 U.S.C. § 7513 are a hybrid kind of action in the sense that they have a RIF-like basis and are nevertheless subject

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[20] *See Miller* v. *Youakim*, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed 2d 701 (1976).

[21] "To suppose that Congress must particularly correct each mistaken [regulatory] construction under penalty of incorporating it into the fabric of the statute appears unwarranted. . . ." (J. Learned Hand). *F. W. Woolworth Co.* v. *United States*, 91 F.2d 973, 976 (2d Cir. 1931), *cert. den.*, 302 U.S. 768, 58 S.Ct. 479, 82 L.Ed. 597 (1938).

to adverse action procedures, we cannot agree that these unique characteristics provide any basis for disregarding the clear language of the statutory provisions which define such furlough actions as adverse actions requiring advance notice.[22] For the forty years that the term "adverse action" has existed in civil service law, it has been recognized as a term of art, and we find that OPM's arguments that these furlough actions are not "truly adverse" plainly disregards this fact. For the above reasons, we conclude that OPM's attempts to redefine these furloughs actions are unpersuasive and that this redefinition has no basis in law.

Both the agency and OPM also contend that providing advance notice in adverse action furloughs would lead to absurd results and serves no purpose because neither the employee nor the agency can change the emergency conditions that triggered the action. Additionally, the agency argues that providing advance notice is inconsistent with the merit principle providing that the federal workforce should be used efficiently and effectively. 5 U.S.C. § 2301(b)(5). We cannot agree that the notice serves no rational purpose. The provision of notice in these actions may be *viewed as a mechanism to allocate the risks of adverse financial consequences between the employee and the agency*: that is, during the 30 day notice period, the agency will bear the financial consequences of keeping the employee on the rolls, and, thereafter, the employee bears the consequences of a non-pay status during the furlough period.[23] Also, we find

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[22] 5 U.S.C. §§ 7511 and 7513. *See also* H. Rep. No. 95-1403, 95th Cong., 2nd Sess. 21-2 (1978) stating: "Subchapter II of Chapter 75 relates to removals and suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. *These actions are adverse actions and in such cases an employee is entitled to full administrative protections.*" [Emphasis supplied.]

[23] This example assumes that the agency is not authorized, as in RIF actions, to place the employee in a non-pay status during the notice period, as provided in 5 C.F.R. § 351.807 (1983). This regulation is not at issue in these appeals since these actions were taken under chapter 75 rather than chapter 35. *See also* note 16, *supra*.

that the provision of notice *serves as a protection against unfair surprise and as a safeguard against arbitrary action.*[24] Second, we note that the merit principles set out in 5 U.S.C. § 2301 are broad, general declarations of legislative policy and as a general rule of statutory construction, such statements are not controlling when, as here, there is specific statutory language that bears on the particular issue under consideration.[25] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615 (1937). Also, as the Board has previously stated, the merit principles set forth in 5 U.S.C. § 2301(b) are not self-executing. *Bodinus* v. *Department of Treasury*, 7 MSPB 385, 389 (1981). *Wells* v. *Harris*, 1 MSPB 199, 229 n.71. Third, we conclude here, as we did in analyzing the validity of this regulation under the Veterans Preference Act, that if Congress believed that the provision of notice in these circumstances was an inefficient employment practice or served no purpose, Congress could have easily created another exception to the notice and reply requirements, or Congress could have defined all furloughs as RIF actions and made them subject to chapter 35, thus eliminating the statutory need for any notice. Congress chose neither of these alternatives, despite the fact that the definition of adverse action furloughs which Congress placed in the Reform Act clearly stated that such actions had a RIF-like basis (lack of work or funds) and were taken for non-disciplinary reasons. 5 U.S.C. § 7511(a)(5). As dis-

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[24] In his petition for appeal appellant Lowe alleges that the lack of 30 days' notice was unfair because it *did not* provide him *with enough time to locate temporary employment. Lowe* Appeal File, Tab 1.

[25] Although we find that the merit principles are not dispositive of the issues in this appeal, we note that the merit principle found at 5 U.S.C. § 2301(b)(2)(8) states that employees should be protected against arbitrary action, and that the appellants' allegations regarding the furlough actions amount to a contention that the agency acted arbitrarily.

cussed above, we cannot find that Congress' actions in this regard have no rational basis. Even if we so found, we conclude *that it* is inappropriate *for the* Board to sit as a committee for review and to *disregard* the order of priorities that Congress consciously selected as reflected in the clear language of the statute at 5 U.S.C. § 7513. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 194-5, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1980). Under the circumstances of this case, we find that it is incumbent upon the Board to exercise the equivalent of judicial restraint in interpreting the plain language of the statute. *Id.*

Finally, both the agency and OPM contend that in construing the Congressional intent with regard to furloughs, the Board should give substantial weight to pre-existing civil service regulations and policy, as it did in *National Treasury Employees Union, supra*, (hereinafter, *NTEU*) and find that the emergency furlough regulation is valid on this basis. In *NTEU*, the Board addressed the issue of whether the placement of seasonal employees in a nonduty, nonpay status in accordance with the terms of their appointments was an adverse action furlough and thus subject to adverse action procedures. The Board found it significant that the term furlough was only defined in 5 U.S.C. § 7511(a)(5) and that in explaining this provision, the Senate report stated that the term "furlough" is "defined elsewhere in title 5 or in civil service regulations or policy issuances and . . . [is] added for uniformity and clarity."[26] Since Congress expressly referred to the pre-existing regulations and policies in defining the term "furlough" and since the civil service policy provided that the placement of seasonal employees in a nonduty, nonpay status pursuant to terms of their appointments were not adverse actions, the Board found that such actions were properly excluded by 5 C.F.R. § 752.401(c)(10) (1983) from the adverse action procedures in 5 U.S.C. § 7513.

After carefully considering the applicability of the Board's holding and reasoning in *NTEU* to these appeals, we con-

[26] S. Rep. No. 95-969, 95th Cong., 2d Sess. 48 (1978).

clude that OPM's and the agency's reliance on this case is misplaced. Both the parties and OPM agree that the actions at issue in these appeals are *furlough actions* and are also *adverse actions* as those terms are used in chapter 75. The dispositive issue is whether Congress intended to authorize OPM to create an emergency furlough exception to the advance notice requirement in 5 U.S.C. § 7513 above and beyond the one exception that Congress specified. A review of the legislative history with regard to the notice requirement and the crime exception discloses that, in discussing these provisions, Congress made absolutely no reference to any pre-existing civil service regulations and policies.[27] In the absence of any such reference, we cannot agree that Congress intended to adopt the pre-existing emergency furlough regulation.

Conclusion

For the foregoing reasons, the Board holds that 5 C.F.R. § 752.404(d)(2) exceeds OPM's regulatory authority inasmuch as it is clearly inconsistent with 5 U.S.C. § 7513(b) and is therefore invalid.[28] Since the furlough actions in the instant appeals were imposed under the authority of an invalid regulation, we find that the actions are "not in accordance with law," 5 U.S.C. § 7701(c)(2)(C). *Cuellar, supra* at 287.

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[27] *See* House and Senate Committee Reports cited at notes 19 and 22, *supra*. The omission of any reference in this regard is significant since Congress referred to the civil service regulations concerning other issues, e.g., the definition of furlough, suspension, grade, and pay, and the (regulatory) right of an employee to review the materials on which the agency relied. Senate Report at 48, 50. These references to civil service regulations in the legislative history of chapter 75 indicate that Congress had more than a passing familiarity with OPM's adverse action regulations.

[28] *See Drumgold* v. *Department of the Navy*, 3 MSPB 89 (1980) (cited in *Cuellar* at 287, n.10), holding that regulatory provisions which conflict with the Civil Service Reform Act are invalid.

The Board has held that where adverse actions are taken without adherence to any of the procedural requirements in 5 U.S.C. § 7513, such an omission constitutes harmful error under 5 U.S.C. § 7701(c)(2)(A). *See, e.g., Baracco* v. *Department of Transportation*, MSPB Docket No. DC075281F0895 at 17 n.9 (and cases cited therein) (April 25th, 1983); *Cuellar, supra*, at 287. Since the appellants in these appeals were not afforded any of the procedural rights required under section 7513(b),[29] the Board also finds that the appellants have shown harmful error since the agency action impaired their

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[29] The notices dated June 22, 1982 that the appellants received informed them that the notice and reply rights were suspended and that the furlough actions would be effective on June 27, 1982. These notices were, in effect, decision letters since they gave no notice of a *proposed* action as required in section 7513(b)(1). Further, the notices did not inform the appellants of their right to reply or to be represented by an attorney. This failure to comply with any of the procedural requirements in section 7513(b) is clearly distinguishable from the lack of compliance at issue in *Baracco, supra*. In that case the Board found that the agency's failure to comply with a statutory procedure in section 7513 was subject to the harmful error standard, and that the appellant had failed to show that the agency requirement that he respond "within 7 days" was harmful error. *Baracco* at 11, 14-15. Additionally, we note that in *Baracco* the agency validly shortened the notice period under the crime exception and substantially complied with the procedural requirements provided for in section 7513. In these appeals, the agency suspended all notice and reply rights under the authority of a regulation we have found to be invalid. In *Baracco*, the Board specifically recognized that an agency's complete failure to provide any of the procedural protections in section 7513 constituted harmful error. *Baracco* at 17, n.9. We therefore find that there was a complete failure to comply with section 7513 in the furlough actions taken in these appeals. Additionally, as we noted in *Parker* v. *Defense Logistics Agency*, 1 MSPB 489, 493 n.6, caution must be exercised in applying the harmful error doctrine when basic rights to procedural due process are implicated.

ability to defend against the action and otherwise prejudiced their rights.

Accordingly, the initial decisions of the presiding officials in these appeals, issued on January 27, 1983, and February 24, 1983, are hereby AFFIRMED as MODIFIED by this Opinion and Order, and the agency actions are hereby REVERSED.

The agency is ORDERED to cancel the furlough actions of the appellants and to award back pay and benefits in accordance with 5 C.F.R. §550.805. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the issuance of this opinion. Any petition for enforcement of this Order shall be made to the Dallas Regional Office in accordance with 5 C.F.R. § 1201.181(a).

Each appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Stephen E. Manrose

Stephen E. Manrose
Acting Clerk

Washington, D.C.

Appendix D

Public Law 97-92
97th Congress

Joint Resolution

Dec. 15, 1981
[H.J. Res. 370]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of the Government for the fiscal year 1982, and for other purposes, namely: . . .

SEC. 132. Notwithstanding any other provision of law, none of the funds appropriated for the Department of Labor, Mine Safety and Health Administration shall be obligated or expended to prescribe, issue, administer or enforce any standard, rule, regulation or order under the Federal Mine Safety and Health Act of 1977 with respect to any independent construction contractor who is engaged by an operator for the construction, repair or alteration of structures, facilities, utilities or private ways or roads located on (or appurtenant to) the surface areas of any coal or other mine, and whose employees work in a specifically demarcated area, separate from actual mining or extraction activities: *Provided,* That no funds shall be obligated or expended to prescribe, issue, administer or enforce any standard, rule, regulation or order under the Federal Mine Safety and Health Act of 1977 on any State or political subdivision thereof.

Appendix E

"SUBCHAPTER II—REMOVAL, SUSPENSION FOR MORE THAN 14 DAYS, REDUCTION IN GRADE OR PAY, OR FURLOUGH FOR 30 DAYS OR LESS

"§ 7511. Definitions; application

"(a) For the purpose of this subchapter—

"(1) 'employee' means—

"(A) an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less; and

"(B) a preference eligible in an Executive agency in the excepted service, and a preference eligible in the United States Postal Service or the Postal Rate Commission, who has completed 1 year of current continuous service in the same or similar positions;

"(2) 'suspension' has the meaning as set forth in section 7501(2) of this title;

"(3) 'grade' means a level of classification under a position classification system;

"(4) 'pay' means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

"(5) 'furlough' means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

"(b) This subchapter does not apply to an employee—

"(1) whose appointment is made by and with the advice and consent of the Senate;

"(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

"(A) the Office of Personnel Management for a position that it has excepted from the competitive service; or

"(B) the President or the head of an agency for a position which is excepted from the competitive service by statute.

"(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office.

"§ 7512. Actions covered

"This subchapter applies to—

"(1) a removal;

"(2) a suspension for more than 14 days;

"(3) a reduction in grade;

"(4) a reduction in pay; and

"(5) a furlough of 30 days or less;

but does not apply to—

"(A) a suspension or removal under section 7532 of this title,

"(B) a reduction-in-force action under section 3502 of this title,

"(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

"(D) a reduction in grade or removal under section 4303 of this title, or

"(E) an action initiated under section 1206 or 7521 of this title.

"§ 7513. Cause and procedure

"(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

"(b) An employee against whom an action is proposed is entitled to—

"(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprison-

ment may be imposed, stating the specific reasons for the proposed action;

"(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

"(3) be represented by an attorney or other representative; and

"(4) a written decision and the specific reasons therefore at the earliest practicable date.

"(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

"(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

"§ 7514. Regulations

"The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations."

31 U.S.C. 1341

The Act provides as follows:

(a)(1) An officer or employee of the United States Government or of the District of Columbia Government may not—

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

Title 31 of the United States Code was revised and codified by Public Law No. 97-258, 96 Stat 877 (1982) (Sept 13, 1982). The provisions of 31 U.S.C. § 1341 formerly appeared at 31 U.S.C. § 665(a).

Appendix F

5 C.F.R. 752.404

(d) *Exceptions.* (1) 5 U.S.C. 7513(b) authorizes an exception to the 30 days' advance written notice when the crime provision is invoked. The agency may require the employee to furnish any answer to the proposed action, and affidavits and other documentary evidence in support of the answer within such time as under the circumstances would be reasonable, but not less than seven days. When the circumstances require immediate action, the agency may place the employee in a nonduty status with pay for such time, not to exceed ten days, as is necessary to effect the action.

(2) The advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

Appendix G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STANLEY ANDRZJEWSKI, *et al.*,[1]

Appellants,

v.

DEPARTMENT OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION,

Respondent.

Docket No.
PH07528210189

Date: Feb. 26, 1985

OPINION AND ORDER

The Office of Personnel Management (OPM) has requested the Board to stay enforcement of its November 1, 1984 order in this case pending the outcome of its petition for judicial review to the United States Court of Appeals for the Federal Circuit. That order directed the Mine and Safety Health Administration (MSHA) to cancel its unlawful furlough of 122 employees.

I

On December 15, 1981, Congress passed a Continuing Resolution which, among other things, prohibited MSHA from obligating or expending funds:

> to prescribe, issue, administer or enforce any standard, rule, regulation or order under the Federal Mine Safety and Health Act of 1977 with respect to any independent construction contractor who is engaged by an operator

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[1] A list of the appellants is contained in the appendix to this opinion.

> for the construction, repair or alteration of structures, facilities, utilities or private ways or roads located on (or appurtenant to) the surface areas of any coal or other mine, and whose employees work in a specifically demaracated area, separate from actual mining or extraction activities: Provided, that no funds shall be obligated or expended to prescribe, issue, administer or enforce any standard, rule, regulation or order under the Federal Mine Safety and Health Act of 1977 on any State or political subdivision thereof.

Pub. L. No. 97-92, 95 Stat. 1183, 1199 (1981). As a result of this resolution, MSHA furloughed each of the appellants from January 3 to February 2, 1982. Relying on OPM's emergency furlough regulation, 5 C.F.R. § 752.404(d)(2)[2], MSHA took the actions without providing appellants 30-days' notice or an opportunity to reply, two procedures required by 5 U.S.C. § 7513. On appeal, the Board found that OPM's emergency furlough regulation was inconsistent with 5 U.S.C. § 7513 and held that the regulation was invalid. The Board then found that MSHA's failure to provide appellants with a 30-days' advance written notice and an opportunity to reply constituted harmful error and reversed the actions.

II

The granting of a stay depends on analysis of four criteria: (1) the likelihood OPM will succeed on the merits of petition for judicial review (2) irreparable injury; (3) substantial harm to other parties interested in the proceedings; and (4) the public interest. *National Association of Farmworkers, et. al.* v. *Marshall*, 628 F.2d 604 (D.C.Cir. 1980); *Parton* v.

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[2] That regulation provides:

> [t]he advance written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.

Federal Communications Commission, 9 MSPB 258 (1982); *Fucik* v. *Department of Housing and Urban Development*, 9 MSPB 847, 848 (1982). In each case, the Board weighs the likelihood of success against the other three criteria. In those cases where the last three criteria strongly favor the granting of a stay, a stay will be granted if a serious legal question exists on the merits. If support for a stay by the last three criteria is slight, however, a stay will be granted only if the likelihood of success is strong. *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C.Cir. 1977). *Berard* v. *Office of Personnel Management*, MSPB Docket No. DC08318210739 (November 15, 1984).

A. THE LIKELIHOOD THAT OPM WILL SUCCEED ON THE MERITS.

OPM argues that the Board's order invalidating the emergency furlough regulation and reversing MSHA's actions against appellants was erroneous. First, OPM contends that the 30-day notice provision in 5 U.S.C. § 7513(b) does not apply to cases, such as these, where the furloughs are caused by an unforeseeable event. Second, OPM contends that the emergency furlough regulation was a valid exercise of its regulatory authority. Third, OPM contends that the Board's decision is incorrect because compliance with it would require MSHA to violate the Anti-Deficiency Act, 31 U.S.C. § 1341. Finally, OPM contends that the decision is incorrect because it contains "numerous errors of law."

These contentions lack merit. OPM does not cite any authority for any of these arguments. In addition, as explained in the Board's decision, 5 U.S.C. § 7513 and its legislative history clearly show that OPM exceeded its authority when it enacted the emergency furlough regulation. Moreover, OPM does not specify the alleged "numerous errors of law" it claims the Board committed in the decision. Under these circumstances, we find that OPM has neither raised a serious legal question about the correctness

of the Board's decision nor shown that it is likely to succeed on the merits of its petition.

B. IRREPARABLE INJURY, HARM TO OTHER INTERESTED PARTIES, AND THE PUBLIC INTEREST.

OPM argues that compliance with the Board's decision would irreparably harm MSHA since compliance would constitute a *per se* violation of the Anti-Deficiency Act and would leave the agency and its officials vulnerable to legal liability and prosecution. OPM has not shown, however, that compliance would violate the Anti-Deficiency Act. The plain language of the statute does not lead to OPM's conclusion, and OPM has not cited any other authority to support its position. While we recognize that the Anti-Deficiency Act prohibits the expenditure or obligation of funds in the absence of appropriations[3], the order in this case would not require such an action. The funding restriction did not reduce MSHA's appropriation; it only prohibited expenditures on certain functions. As long as MSHA does not spend money on the prohibited functions, the Anti-Deficiency Act will not be violated. C.f. 60 Comp. Gen. 440. Since the Board's order would not require MSHA to spend money on the prohibited functions, compliance will not violate the Act. Indeed, MSHA apparently recognized this itself when it continued to employ appellants in some capacity for two weeks after the enactment of the funding restriction. Accordingly, we find that OPM has failed to show that compliance would result in irreparable harm to MSHA.

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[3] The Anti-Deficiency Act provides:

> (a) (1) An officer or employee of the United States Government or of the District of Columbia Government may not—
>
> > (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
> >
> > (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341.

Next, OPM asserts that a stay would not substantially harm the appellants because they will eventually receive back pay for their furloughs if it loses its appeal. But OPM's argument ignores the fact that more than three years have elapsed since appellants were furloughed. On this record, OPM has failed to prove that further delay will not substantially harm appellants.

Finally, OPM argues that a stay would promote the public interest. According to OPM, enforcement of the order pending judicial review will create tension between the executive and legislative branches of government and will undermine the public's confidence in the government's expenditure of money. These assertions, however, are based on the premise that there is a serious legal question concerning the correctness of the Board's decision. Here OPM has not been able to demonstrate that such a question exists. Consequently, OPM's arguments that a stay will promote the public interest are not supported. In our view, the public interest will be better served by MSHA's prompt compliance with the Board's order.

III

In summary, we find that OPM has not shown that the Board's decision either raises a serious legal question or that it is likely to succeed on the merits of its appeal. We also find that OPM has not shown that MSHA will suffer irreparable harm by the denial of the stay, that the interests of the appellants will not be substantially harmed, or that the public interest favors granting the stay. Accordingly, OPM's request for a stay is DENIED. MSHA shall forward proof of compliance with the Board's order in this case within 15 days of this order.

FOR THE BOARD:

Washington, D.C.

Robert E. Taylor
Clerk of the Board

(2)

Supreme Court, U.S.
FILED
SEP 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2030

In the Supreme Court of the United States

OCTOBER TERM, 1987

STANLEY ANDRZJEWSKI, ET AL., PETITIONERS

v.

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-2030

STANLEY ANDRZJEWSKI, ET AL., PETITIONERS

v.

CONSTANCE HORNER, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners challenge the court of appeals' decision sustaining the facial validity of OPM's "emergency furlough" regulation, 5 C.F.R. 752.404(d)(2), which provides that the usual requirement of 30 days' advance notice before furloughs does not apply to furloughs necessitated by "sudden emergencies."

1. On December 15, 1981, Congress enacted Public Law No. 97-92, 95 Stat. 1183. This was a "continuing resolution" that provided appropriations for a number of federal agencies and departments for the period extending from December 16, 1981, through March 31, 1982. The continuing resolution stated that, whenever the amount appropriated or authority granted to an agency under the House-passed version of the agency's regular appropriation bill differed from that under the Senate-passed version, "the pertinent project or activity shall be continued under the lesser amount or the more restrictive authority" (§ 101(a)(3), 95 Stat. 1183).

The Mine Safety and Health Administration of the Department of Labor (MSHA) was one of the agencies funded by this continuing resolution. The House-passed version of MSHA's regular appropriation bill (H.R. 4560, 97th Cong., 1st Sess. (1981)) had contained the so-called "Rousselot Amendment" (127 Cong. Rec. 23384 (1981)). That Amendment would have barred MSHA from using appropriated funds for the administration of mine safety and health programs relating to certain surface mining activities. The purpose of the Rousselot Amendment was to resolve a dispute over whether MSHA or the Occupational Safety and Health Administration (OSHA) should inspect certain surface mines. See Pet. App. 4a. The Rousselot Amendment would have terminated MSHA's jurisdiction over 85% of the mines it had theretofore inspected, thus reducing MSHA's personnel requirements by 55% (*ibid.*). However, despite the Rousselot Amendment's severe curtailment in MSHA's activities, Congressman Rousselot neither proposed nor obtained any reduction in the amount that had been appropriated for the agency ($155,734,000) by the bill as it stood prior to his amendment (*ibid.*).

When H.R. 4560 reached the Senate, the Rousselot Amendment was deleted (Pet. App. 4a). The Senate-passed version of MSHA's regular appropriation bill would thus have restored authority for the activities that Congressman Rousselot had sought to eliminate. See S. Rep. 97-268, 97th Cong., 1st Sess. 23 (1981). While thus restoring the scope of MSHA's activities, however, the Senate version of the bill provided MSHA $200,000 less than the House version. See Pet. App. 4a.

2. The Acting Administrator of MSHA interpreted the continuing resolution as requiring the immediate furlough of 139 MSHA employees (Pet. App. 2a). This interpretation was based on the belief that the House-passed version of the agency's appropriation bill, by virtue of the Rous-

selot Amendment, was "more restrictive" (Pub. L. No. 97-92, § 101(a)(3), 95 Stat. 1183) than the Senate-passed version, even though the former would have appropriated more money. MSHA thus construed the continuing resolution as incorporating the Rousselot Amendment by reference (Pet. App. 5a n.3), and it in turn construed the Rousselot Amendment as necessitating a reduction in its appropriation to the extent that the appropriated funds would have been spent on salaries of persons who had been performing the activities prohibited by the Amendment (*id.* at 6a).

Based on this construction of the continuing resolution, the Acting Administrator of MSHA issued, on December 18, 1981, individual notices advising employees that they would be furloughed on January 3, 1982, for a period not to exceed thirty days, or not to extend beyond February 2, 1982 (Pet. App. 6a). The notices cited the continuing resolution as the reason for the furlough, and explained that due to the unforeseeability of the circumstances necessitating the furlough, 30 days' advance written notice and an opportunity to reply, which normally would be provided under 5 U.S.C. 7513(b), were not required here. This latter determination was based on OPM's "emergency furlough" regulation, 5 C.F.R. 752.404(d)(2). That regulation provides that "advance written notice and opportunity to answer are not necessary for furlough without back pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities." The employees in question were furloughed, without pay, effective January 3, 1982, for a 30-day period ending on February 2, 1982.

3. Appeals from the agency's action, including those taken by petitioners, were filed in seven Merit Systems Protection Board (MSPB) regions (Pet. App. 21a). Several MSPB presiding officials reversed the furlough actions on

the ground that 5 C.F.R. 752.404(d)(2) was invalid, concluding that the regulation was inconsistent with 5 U.S.C. 7513(b) and with the MSPB's interpretation of that statute in *Cuellar* v. *United States Postal Service,* 8 M.S.P.R. 624 (1981). Pet. App. 23a-24a. Other presiding officials sustained the furloughs, ruling that 5 C.F.R. 752.404(d)(2) was valid and that the regulation had been properly invoked here "because the Congressional action was unforeseeable and not within the discretion of the agency" (Pet. App. 24a). Still other presiding officials "held that any error in not giving 30 days' notice was harmless because the notice and opportunity to respond would have been futile in view of the overwhelming nature of the fiscal catastrophe" (*id.* at 6a).

Petitions for review by the full MSPB were filed by MSHA and the furloughed employees, with OPM and OMB filing briefs as intervenors (Pet. App. 21a-22a). In its final decision issued on November 1, 1984, the MSPB declined to address petitioners' threshold contentions (see *id.* at 25a) that the continuing resolution did not create an emergency within the meaning of 5 C.F.R. 752.404(d)(2), and hence that MSHA had erroneously invoked OPM's emergency furlough regulation. Instead, the MSPB proceeded at once to address the regulation's validity. Adopting the rationale in *Hastie* v. *Department of Agriculture,* 24 M.S.P.R. 64 (1984), which was decided the same day, the MSPB held that the legislative history of the statutory notice requirement for furloughs of 30 days or less showed that the emergency furlough regulation was "clearly inconsistent with [5 U.S.C. 7513(b)] and therefore invalid" (Pet. App. 27a (footnote omitted)). The Board then determined that MSHA's action in ordering the furloughs without any of the procedural protections of 5 U.S.C. 7513(b) was

unlawful and that this constituted harmful error under 5 U.S.C. 7701(c)(2)(A), requiring reversal of the furloughs (Pet. App. 28a-29a).

3. The Court of Appeals for the Federal Circuit reversed the MSPB, Judge Nichols dissenting (Pet. App. 1a-20a). The court of appeals held that the MSPB had erred in declaring the emergency furlough regulation invalid and "remand[ed] for a determination of whether the regulation was properly invoked" (*id.* at 2a).

OPM had argued that its emergency furlough regulation properly found Section 7513(b)'s procedural protections to be inapplicable where furloughs were required by an Act of Congress; any other result, OPM maintained, would require the employing agency to violate the ban on the expenditure of unappropriated funds set forth in the Anti-Deficiency Act, 31 U.S.C. 1341. See Pet. App. 7a. The Federal Circuit stated: "That there is a tension between these two statutory provisions is readily apparent" (*ibid.*). The court of appeals noted that the emergency furlough regulation was entitled to the deference due a long-standing agency interpretation. *Ibid.* (citing *Young* v. *Community Nutrition Institute,* 476 U.S. 974 (1986)). And the court determined that Sections 7512 and 7513 were genuinely ambiguous in their application to emergency situations (Pet. App. 10a).

After examining the purposes underlying the procedural protections of Section 7513(b), the court of appeals concluded that OPM's view, as reflected in the emergency furlough regulation, was reasonable. "If an emergency furlough action is taken because an agency has no choice, rather than for the 'efficiency of the service'—as that term is generally understood—it can reasonably be said that the agency did not 'take an action' covered by [5 U.S.C. 7513]" (Pet. App. 11a). Having thus found that OPM's regulation properly excluded emergency furloughs from the category of actions covered by Section 7513, the court

of appeals concluded that the regulation was valid and remanded the case to the MSPB for a determination whether "the regulation was properly invoked under the circumstances of this case" (Pet. App. 12a).

Judge Nichols dissented, stating that the majority had decided the issues in the wrong order (Pet. App. 13a-15a) and that "if the MSPB was right, it was for the wrong reasons" (*id.* at 19a). Judge Nichols agreed with the majority that the MSPB had erred in holding OPM's emergency furlough regulation "totally invalid" on its face (*id.* at 18a). He pointed out, however, that the "regulation, if valid, yet might not apply to the case before us," and he maintained that the majority should not have considered the regulation's validity without first satisfying itself that the regulation "pertains to this case" (*id.* at 18a, 20a). Judge Nichols then suggested two reasons why the emergency furlough regulation may have been invoked improperly here. First, he suggested that both MSHA and the MSPB had erred in interpreting the continuing resolution "to cut off funding to pay the [employees] in question during a 30-day notice period" (*id.* at 19a). Second, he suggested that the continuing resolution in any event may not have constituted "unforeseeable circumstances" within the meaning of OPM's regulation, and that "the alleged fiscal emergency [was] a myth" (*id.* at 15a, 19a). Judge Nichols acknowledged that his views on this issue were "tentative" inasmuch as "the issue was not briefed or argued" in the Federal Circuit (*id.* at 14a). He therefore concluded that "the appropriate thing to do is * * * vacate and remand" (*id.* at 20a), noting that "the MSPB should go into it on remand and not consider itself bound by my unaided analysis" (*id.* at 14a).[1]

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[1] Although Judge Nichols styled his opinion a "dissenting" opinion (Pet. App. 13a), it might also have been characterized as a concurrence in the judgment, since he agreed with the majority as to the facial validity of OPM's regulation (*id.* at 13a, 18a) and also agreed

4. Although petitioners discuss a number of issues in their petition, the court of appeals made clear that it was deciding one narrow and precisely defined question: "[w]hether the emergency furlough regulation, 5 C.F.R. § 752.404(d)(2), is valid or invalid" (Pet. App. 7a). The Federal Circuit reversed the MSPB on that point and remanded (*id.* at 2a), making clear that it was not deciding two other questions necessary to ultimate disposition of this case—whether MSHA's failure to give 30 days' advance notice of the furloughs, if error, was harmless; and whether the continuing resolution required MSHA to stop paying the furloughed employees (*ibid.*). On the latter point, the court of appeals noted OPM's assertion that MSHA "would have violated 31 U.S.C. § 1341 if the agency had kept petitioners on the payroll." "If that proposition is correct," the court of appeals stated, "it is a legitimate ground for invoking the emergency furlough regulation." Pet. App. 12a. Thus, the questions whether the continuing resolution in fact prevented MSHA from paying the furloughed employees, and whether MHSA's failure to provide procedures, if wrongful, was actually prejudicial, were not decided by the court of appeals and are not before this Court. Rather, those questions must be decided in the first instance by the MSPB on remand.[2]

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that the case should be remanded to the MSPB for consideration of whether the regulation had been properly invoked (*id.* at 14a, 20a). And while Judge Nichols suggested that the court should have first decided the threshold question of the regulation's applicability, he acknowledged that this question had not been addressed in any detail by the MSPB (*id.* at 13a, 19a) and that it had not been "briefed or argued" in the court of appeals (*id.* at 14a).

[2] The court of appeals also noted that it was not even deciding whether the Rousselot Amendment actually was incorporated in the continuing resolution (Pet. App. 5a n.3). The applicability of the Rousselot Amendment and MSHA's interpretation of it are thus likewise open to reexamination by the MSPB on remand.

Under these circumstances, petitioners' challenge to the facial validity of OPM's emergency furlough regulation, whatever the merits of that challenge, is not now ripe for review by this Court. If, as a result of the proceedings on remand, the emergency furlough regulation is held to have been erroneously invoked by MSHA, and if MSHA's failure to provide 30 days' advance notice is held to have been harmful error, petitioners' position will be vindicated and their challenge to the regulation's validity will be moot. If, on the other hand, the government succeeds in demonstrating that the regulation was properly invoked or that the agency's error, if any, was harmless, petitioners will then be able to present their contentions about the regulation's validity to this Court, together with any other claims that they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[3] Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will do so if the Court requests.

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